

Volume I  
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COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

SUPERIOR COURT DEPARTMENT  
 OF THE TRIAL COURT

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COMMONWEALTH OF MASSACHUSETTS \*

Plaintiff \*

v. \* DOCKET NUMBER 9572CR46579

\*

EMORY G. SNELL, JR. \*

Defendant \*

\*\*\*\*\*

HEARING

BEFORE THE HONORABLE CHRISTOPHER J. MUSE

APPEARANCES:

For the Plaintiff:

Cape & Islands District Attorney's Office

3231 Main Street

Barnstable, Massachusetts 02630

By: Elizabeth Anne Sweeney, Esq.

For the Defendant:

398 Columbus Avenue

Boston, Massachusetts 02116

By: Richard J. Shea, Esq.

For Office of Chief Medical Examiner:

720 Albany Street

Roxbury, Massachusetts 02118

By: Eric B. Hogberg, Esq.

Barnstable, Massachusetts

July 10, 2018

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## I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
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None - Hearing				
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P R O C E E D I N G S

(Court called to order.)

COURT OFFICER: Court, all rise.

THE COURT: Okay.

COURT OFFICER: Court's now in session. Please be seated.

THE COURT: Okay. Good morning, everyone.

THE CLERK: All right. Good morning.

This is July 10th, 2018. The Honorable Christopher J. Muse presiding.

This is Commonwealth v. Emory Snell.

If parties could identify for electronic record, please.

THE COURT: Commonwealth first, please.

MS. SWEENEY: Elizabeth Sweeney for the Commonwealth.

THE CLERK: Okay.

MR. HOGBERG: Attorney Eric --

MR. SHEA: Oh, I'm sorry.

MR. HOGBERG: Attorney Eric Hogberg, general counsel for the Office of the Chief Medical Examiner.

THE COURT: Good morning.

MR. SHEA: Richard Shea for Emory Snell.

THE COURT: Okay.

All right. As I understand it, I never requested that Mr. Snell be habed in for this hearing, but I don't have any problem with him to attend as much as he possibly can.

1           He's an hour out. I don't think everyone wants to come  
2 back tomorrow or next week.

3           Time is of the essence, I indicated to everyone at the  
4 status hearing that I will be unlikely able to handle the  
5 actual motion for a new trial or a hearing, if there is one,  
6 which I suspect that there will be, just to be candid with  
7 you, and then it would have to be transferred to another  
8 Judge.

9           I want to make it as orderly as possible. I want you to  
10 be able to flush out the issues. Today we have a discovery  
11 issue.

12           And then put the burden upon the -- or the demand upon  
13 the plaintiff -- the defendant's counsel to tell me exactly  
14 how he would propose a -- an evidentiary hearing, much of it  
15 is kind of transparent to me in terms of who the experts are  
16 and what they would be presenting.

17           The Commonwealth certainly has an opportunity -- should  
18 have an opportunity -- will have an opportunity to contradict  
19 any proposed testimony from any such designated witnesses,  
20 particularly the expert witnesses.

21           Now, is there any objection to me continuing at least  
22 with regard to the -- the scheduling issues?

23           Counsel?

24           MR. SHEA: No, Your Honor.

25           THE COURT: Okay. So let's work on the assumption that

1       regardless of whether the medical examiner's personnel file is  
2       to be produced, that there will be an evidentiary hearing.

3               So let me ask you, what witnesses would you be  
4       presenting? And again, I say regardless of any -- work on the  
5       assumption that it shall not be produced, and don't let that  
6       be an indication that it won't be.

7               What will that hearing look like?

8               MR. SHEA: I -- as you know, Your Honor, we produced  
9       reports from a number of forensic pathologists --

10              THE COURT: I saw them. Friedlander, I saw Baden. I saw  
11       Young.

12              Are those all potential witnesses?

13              MR. SHEA: No. The potential witnesses at this point are  
14       Young and Baden.

15              THE COURT: Is it Baden? I apologize.

16              MR. SHEA: Yeah. I -- it's -- it's -- it's not Baden or  
17       Baden. I think it's Baden.

18              THE COURT: I'll work on Baden, if he's not here to  
19       object, I can do it.

20              MR. SHEA: So I've talked to Dr. Young. I talked to Dr.  
21       Baden briefly last week, and he was on vacation, so he  
22       promised to get back to me this week.

23              THE COURT: Well, they're busy people, they're still in  
24       practice, I assume; correct?

25              MR. SHEA: Yes.

1 THE COURT: All right. So --

2 MR. SHEA: And as far as I can tell, they're both  
3 available.

4 THE COURT: Well, the availability is not going to happen  
5 between now and August, the 16th, I take it; is that fair?

6 MR. SHEA: Yes.

7 THE COURT: All right. Now, are there any other  
8 witnesses that you'd be presenting?

9 I know there's an ineffective assistance of counsel  
10 claim.

11 MR. SHEA: It's possible that I will summons Sandra  
12 Bloomenthal, the attorney -- the trial attorney who dealt with  
13 the cross-examination of the medical examiner.

14 There's also another defense attorney, Albert Belas,  
15 who's sort of fallen off the -- out of communication, let's  
16 say. He's --

17 THE COURT: I read about him, but who is he again,  
18 please?

19 MR. SHEA: He was -- he was a co-counsel with Ms.  
20 Bloomenthal. He seems to have some knowledge of what they  
21 were doing to develop forensic pathology testimony, but he --  
22 he was not primarily responsible for that.

23 He's retired. Probably not in good health, in Prudence  
24 Island, Rhode Island during the summer, and I've been unable  
25 to really get in touch with him.

1 THE COURT: Why?

2 MR. SHEA: He doesn't answer phone calls and -- or  
3 respond to letters.

4 THE COURT: How old is he?

5 MR. SHEA: I would guess 80.

6 THE COURT: Okay.

7 With regard to the ineffective assistance, this is --  
8 this is -- this is problematic for me, so I want to hear you.  
9 What -- I know that Dr. Katz was their consultant, possible  
10 expert; is that fear?

11 MR. SHEA: Katsas.

12 THE COURT: Katsas?

13 Is my -- is it K-A-T-Z?

14 MR. SHEA: K-A-T-S-A-S.

15 THE COURT: Katsas. I apologize. Okay.

16 One of the propositions you put forward is that they  
17 should have retained another expert to be able to say things  
18 that would be consistent with Baden and Young, Friedlander et  
19 al. Fair?

20 MR. SHEA: Yes.

21 THE COURT: And what is the basis for that?

22 MR. SHEA: The -- the basis for that is that the -- there  
23 was insufficient work with Dr. Katsas to develop cross-  
24 examination --

25 THE COURT: Yeah. Let me stop right there. How would

1       you know that in view of the work product limitations? How  
2       would you know what they said or did in terms of the  
3       preparation of the cross-examination?

4               Are you following me?

5               MR. SHEA: Yes. But she's the defendant -- she's the  
6       defense counsel, so I'm not sure --

7               THE COURT: So you don't know --

8               MR. SHEA: I --

9               THE COURT: -- her work --

10              MR. SHEA: I'm not sure her -- her work product --

11              THE COURT: Why -- but you've come to a conclusion that  
12       it was inadequate, thus becoming ineffective --

13              MR. SHEA: Yes.

14              THE COURT: -- because they did not present a -- a -- an  
15       expert witness.

16              MR. SHEA: Number one --

17              THE COURT: But you don't know why.

18              They had --

19              MR. SHEA: Oh, I know why.

20              THE COURT: Why is that?

21              MR. SHEA: I don't -- I don't feel like I should disclose  
22       it right now.

23              THE COURT: Well, at some point, you're going to have to  
24       say so. In other words, you're going to have make some kind  
25       of offer as to why the -- there -- there's several things



1 going on.

2 Let me just -- let me just tell you.

3 There -- there's -- there's a fair inference that could  
4 possibly be drawn. I'm using those words purposefully now,  
5 that they did an inadequate job of -- of preparing the case by  
6 getting a -- a -- an expert that wouldn't be able to testify  
7 back in 1995 consistent with what you would propose Baden,  
8 Young, Friedlander et al might testify to in 2018; right?

9 MR. SHEA: Yes.

10 THE COURT: We had -- they did have an expert. They had  
11 someone that had the bonafides of -- of being able to  
12 critique, if you want, and to advise and consult and also to  
13 step forward and I would assume to be able to testify. And  
14 that would have been Dr. Katsas; right?

15 MR. SHEA: That's correct.

16 THE COURT: And somehow or another during the course of  
17 their investigation and their consultation with him, he chose  
18 not to testify or he did -- he did not testify. And it could  
19 very well have been because he did not dispute the fundamental  
20 findings of -- why am I drawing a blank? That's why he's  
21 here.

22 Dr. --

23 MR. SHEA: Zane.

24 THE COURT: Zane. Excuse me. Right. I've been reading  
25 all about Zane.

1           He could very well have not disputed the findings, but he  
2           could have also served as the advisor as to -- as -- as -- as  
3           experts often do for defense counsel and for -- and for -- for  
4           both sides actually.

5           So there's a -- there's a possibility that that's what he  
6           did, that he did agree with the finding, and that he was just  
7           there just simply to assist.

8           MR. SHEA: Well, let me -- let me assume for the sake of  
9           argument that he did agree with the finding. I think if so --  
10          he may have had an incorrect basis for agreeing with that.

11          THE COURT: But that goes back to the reasonableness of  
12          the attorneys to rely upon a second opinion that came forward  
13          with the credentials and said to them possibly this finding of  
14          suffocation and no other cause, no other natural causes, is  
15          supported by the evidence, and I can't contradict his opinion  
16          in good faith.

17          That's always a possibility. And then if -- why would  
18          that be a Saferian issue with regard to the attorneys for not  
19          relying upon an expert that so said that for ineffective  
20          assistance?

21          MR. SHEA: The -- the reason for the con -- the  
22          conclusion was we -- that Katsas drew was -- was incorrect,  
23          and the attorney should have recognized that --

24          THE COURT: Why.

25          MR. SHEA: -- as incorrect.

1           Because it was pretty farfetched.

2           THE COURT:   Except that you have a farfetched  
3   quote/unquote opinion that was accepted not only by the jury  
4   and a quote/unquote farfetched opinion that was also supported  
5   by the SJC.

6           Just stating for a moment --

7           MR. SHEA:   Yeah.

8           THE COURT:  -- and you also had an independent, that's --  
9   as a -- as a hired expert to consult and to -- to testify,  
10   that --

11          MR. SHEA:   Well --

12          THE COURT:  -- could possibly have said no, the finding  
13   is fine, there could have been more things done, here are some  
14   of the things you may want to challenge him on, etcetera,  
15   etcetera, etcetera.

16          MR. SHEA:   I -- I think that the -- the -- the attorney's  
17   testimony would be that on the basis of one incorrect finding,  
18   he threw up his hands and didn't help any further.

19          THE COURT:   But you don't know that to be -- you weren't  
20   there --

21          MR. SHEA:   I --

22          THE COURT:   -- to watch his hands go up.

23          MR. SHEA:   No, I wasn't.

24          And I am a bit in a difficult position because Attorney  
25   Bloomenthal doesn't want to cooperate with the defense --

1 THE COURT: I appreciate that.

2 MR. SHEA: -- and I've only gotten some information --

3 THE COURT: I --

4 MR. SHEA: -- from her.

5 THE COURT: I understand that and those things can  
6 finally be resolved. But your claim is ineffective  
7 assistance. I understand why people get their spine up when  
8 those claims come. It could happen to you. It could happen  
9 to anyone here. In fact, it will happen to them in a moment  
10 because the Assistant District Attorney has been charged with  
11 failure to disclose by Brady.

12 So let me touch that.

13 Is it an -- let us work on the assumption that factually  
14 -- factually, no one in the District Attorney's Office knew  
15 any of the things that Kessler has alleged of Zane. Work on  
16 that assumption.

17 Would that play into my finding or the -- the trial  
18 Judge's finding as to -- as to a Brady violation?

19 MR. SHEA: Well, Brady violations can take different -- a  
20 different --

21 THE COURT: I know --

22 MR. SHEA: -- severity.

23 THE COURT: -- what they can do.

24 I'm asking --

25 MR. SHEA: The one where --

1 THE COURT: -- in this case --

2 MR. SHEA: -- the District Attorney --

3 THE COURT: In this case -- in this case. I understand  
4 --

5 MR. SHEA: Yeah.

6 THE COURT: -- Brady may contemplate it, but in this  
7 case, in this case, the fact that the -- they may say at some  
8 point that no one in the universe of the District Attorney's  
9 Office knew of the things that might be in the personnel file  
10 or were observed by Dr. Kessler, whether or not that, in these  
11 circumstances would -- would provide a basis for a -- a  
12 defense, your -- to a Brady charge.

13 MR. SHEA: It's not a complete defense. It's a complete  
14 -- it's a defense to misconduct by the District Attorney,  
15 which would be the worst kind of Brady violation.

16 But you also have case law that says that the OCME is an  
17 agent of the prosecution, and --

18 THE COURT: I think --

19 MR. SHEA: -- they're under a --

20 THE COURT: -- that may --

21 MR. SHEA: -- duty --

22 THE COURT: I think -- excuse me for a moment.

23 MR. SHEA: -- to make disclosures.

24 THE COURT: I think that you're going to have to remember  
25 that when we get to the discovery issue because there isn't --

1       there's a -- there's a relationship as to whether -- whether  
2       it's independent or agency or not, and I want to come back to  
3       that in a moment.

4             MR. SHEA: All right.

5             THE COURT: But -- but they don't know about it.

6             So what -- what efforts should they have made to be able  
7       to determine whether there was any discipline matters or any  
8       restrictions on Dr. Zane's duties, the performance of his  
9       duties?

10            MR. SHEA: They should have -- they should have asked for  
11       -- they -- they have discovery requests for his CV, --

12            THE COURT: One second.

13            Was that not given to you?

14            MR. SHEA: That was given the day of trial.

15            THE COURT: Well, it was given --

16            MR. SHEA: It was given.

17            THE COURT: I mean I appreciate --

18            MR. SHEA: Okay.

19            THE COURT: -- the lateness.

20            MR. SHEA: And then laboratory procedures.

21            THE COURT: Okay. And --

22            MR. SHEA: And the --

23            THE COURT: -- was that --

24            MR. SHEA: -- laboratory procedure that was not given was  
25       the -- Kessler's allegation that there was a formal

1 requirement that Dr. Zane conduct his laboratory autopsies  
2 with supervision of --

3 THE COURT: Okay.

4 MR. SHEA: -- a higher up.

5 THE COURT: So there's two claims you've made that he  
6 should have been doing it with supervision, and secondly --

7 MR. SHEA: Right.

8 THE COURT: -- that it shouldn't have been done in  
9 Pocasset, it should have been done up at Harrison Avenue in  
10 Boston.

11 MR. SHEA: And -- and my position is that the -- those  
12 are exculpatory points which the OCME should have given to the  
13 District Attorney, and at this point, when we discover it, we  
14 can say --

15 THE COURT: I --

16 MR. SHEA: -- that is exculpatory under Brady.

17 THE COURT: So it's now recently discovered, newly  
18 discovered --

19 MR. SHEA: It is --

20 THE COURT: -- perhaps.

21 MR. SHEA: -- newly discovered, yes.

22 THE COURT: So the -- am I too old to remember the short  
23 story about the lady and the tiger? Anyone know of that one?  
24 When he had to decide whether it was going to be the lady or  
25 the tiger that was behind the door, and there were bad choices

1 for both of them?

2 In this case, there's a Brady violation versus newly  
3 discovered. I want the Commonwealth to think about that for a  
4 moment.

5 It -- if it was not a Brady violation, that is -- and it  
6 was not known to you, then why would that not -- it may not  
7 have enough heft to be able to get a new trial, but why would  
8 the issue of the laboratory restrictions if proven and if the  
9 -- well, the laboratory restrictions.

10 If it's not allowed -- if it's not a Brady violation,  
11 then is it -- is it newly discovery for purposes of this 30  
12 hear -- Rule 30 hearing.

13 So there's no -- there's no allegation -- you have no  
14 evidence of misconduct. What you have is more the acts of  
15 omission; is that fair?

16 MR. SHEA: Yes.

17 THE COURT: For support of the Brady violation.

18 MR. SHEA: Okay.

19 THE COURT: Okay.

20 So now, let's go back to my original request.

21 It's your position that the claim of ineffective  
22 assistance of counsel is ripe for hearing; is that fair?

23 MR. SHEA: Yes.

24 THE COURT: The word fishing expedition has come up in --  
25 in the most recent docketed opposition to discovery. Do you



1 think there might be some basis for a claim of a fishing  
2 expedition as to the effective assistance issues with -- with  
3 Mr. Baylor's -- Attorney Baylor and Attorney Bloomenthal?

4 MR. SHEA: With -- with Bloom -- with Bloomenthal,  
5 there's -- there's something to look into, so it's not pure --  
6 I'm not sure what a fishing expedition is --

7 THE COURT: A fishing expedition --

8 MR. SHEA: -- in legal terms --

9 THE COURT: -- is a --

10 MR. SHEA: -- anyway.

11 THE COURT: It's possible that she -- she was totally  
12 ineffective and that she absolutely should have done something  
13 differently, and the different thing would have been to hire  
14 -- hire one of the three or four or five other experts that  
15 you -- you folks have been able to -- to retain to review the  
16 medical file.

17 MR. SHEA: Yes.

18 THE COURT: And she didn't do it.

19 But the question is whether or not she's going to say  
20 yeah, I knew all about it, and I chose to proceed to trial  
21 ineffectively with the knowledge and understanding.

22 My guess is that she's never going to say that. It's  
23 just a guess.

24 MR. SHEA: Well, that --

25 THE COURT: And --

1 MR. SHEA: -- that's where an intermediate waiver  
2 resolving that would be to have a deposition of Ms.  
3 Bloomenthal.

4 THE COURT: Well, there's a way of getting her to conform  
5 to a request for production, but there's still a -- an issue  
6 --

7 MR. SHEA: Yeah.

8 THE COURT: -- at this point of -- of whether or not  
9 there is a -- a prima facie showing of ineffective assistance  
10 for the failure to get a -- a third opinion.

11 MR. SHEA: Well, I -- again, another piece of that is  
12 this Attorney Bielitz that I don't have signed affidavit from  
13 him, but what he says and what I assume he'll testify --

14 THE COURT: Do you have the log notes --

15 MR. SHEA: -- if -- if he's --

16 The lobby conference, yes.

17 He -- he, as an experienced criminal defense attorney,  
18 felt that a second pathologist was needed given what they were  
19 going into trial with, but -- and -- and he says that he asked  
20 Judge Travers for that, and he was told no continuance, and  
21 they had to go to trial.

22 So --

23 THE COURT: Not an unreasonable response from the Judge  
24 on the eve of trial, this is what you're --

25 MR. SHEA: I --

1 THE COURT: -- you know, you're supposed to be ready, and  
2 if you have a need and you have a basis for a -- so he was  
3 Court appointed, I assume?

4 MR. SHEA: No. I'm still trying to sort that out. They  
5 were retained initially, and then Mr. Snell ran out of money,  
6 and I don't know exactly when the Commonwealth started paying.

7 I've seen a bill for 66,000 dollars from the defense team  
8 that got paid, I assume, I don't know how much of that came  
9 out of a retainer and how much the Commonwealth paid after the  
10 fact, I don't know at this point.

11 I know Mr. Snell was in -- become indigent during the  
12 pretrial proceeding, so therefore --

13 THE COURT: He would have been entitled to it.

14 MR. SHEA: -- there were -- there were motions for  
15 investigators and --

16 THE COURT: And it was allowed.

17 MR. SHEA: -- so forth.

18 Yes.

19 THE COURT: And so the reasonableness of denying a  
20 continuance based upon getting an additional opinion --

21 MR. SHEA: Well, the -- it's also that Mr. -- Mr. Snell  
22 went to trial something like 125 days after indictment, and  
23 all of these events --

24 THE COURT: Fastest rocket docket --

25 MR. SHEA: -- all of these events happened during the

1 summer.

2 THE COURT: Yeah.

3 MR. SHEA: Katsas first came on the scene, as far as I  
4 can tell, in June, and he consulted with Bloomenthal in June  
5 and July, and then the case was --

6 THE COURT: Why --

7 MR. SHEA: -- on for August.

8 THE COURT: Why was it so fast? I've never seen a case  
9 go so fast.

10 MR. SHEA: I -- I have no idea, it --

11 THE COURT: But there was already -- there was no -- I  
12 mean --

13 MR. SHEA: Judge -- Judge Travers maybe wanted to get a  
14 trial while he was here. I don't know where he was -- he  
15 usually was in Worcester --

16 THE COURT: Right.

17 MR. SHEA: -- to my knowledge.

18 Yeah.

19 But it was -- he wanted a trial in late August, which is  
20 what happened, and he denied a continuance in chambers which  
21 he put on the record. It was ex parte, so we don't have any  
22 --

23 THE COURT: But I mean what -- well, again, aside from  
24 requesting late funds for an additional pathologist, what  
25 other reasons would have existed for a continuance?

1           So I appreciate the -- the pressures of anyone  
2 prosecuting and defending a first degree murder case. I  
3 appreciate that.

4           MR. SHEA: Uh-huh.

5           THE COURT: But what --

6           MR. SHEA: Well, she didn't --

7           THE COURT: -- what did -- was there a need for a  
8 continuance?

9           MR. SHEA: Well, she -- she didn't have anything to  
10 cross-examine him with.

11          THE COURT: She had --

12          MR. SHEA: The --

13          THE COURT: -- Dr. Katsas.

14          MR. SHEA: But he didn't give her anything, that's --  
15 which is obviously from the cross-examination.

16          THE COURT: Don't say that. She had Dr. Katsas.

17          MR. SHEA: Yes.

18          THE COURT: She had Dr. Katsas. She sat down with Dr.  
19 Katsas.

20           I appreciate the fact that he -- that he may or may not  
21 have made himself quickly available, but -- but she had an  
22 expert to be able to consult and to testify to.

23           Right?

24          MR. SHEA: Yes.

25          THE COURT: Was all of the medical records that the -- in

1 2005, was it Justice Connor that provided a limited discovery  
2 order?

3 MR. SHEA: That's correct.

4 THE COURT: Was -- was that information not provided at  
5 trial?

6 MR. SHEA: I -- I don't -- I can't say that. I think  
7 that it was provide -- I think Katsas -- I know Katsas was  
8 over at the OCME looking at material. I don't know what was  
9 in the hands of the attorneys, but Katsas had access to this  
10 material.

11 THE COURT: Which would have been a -- produced  
12 subsequently for --

13 MR. SHEA: Yes. There was -- there was -- we got to a  
14 point where Judge Travers, after the three motions to compel  
15 dilatory discovery were allowed, finally, in August, he said I  
16 -- he had a conference with all counsel, and he said  
17 everything's been produced.

18 So --

19 THE COURT: Who --

20 MR. SHEA: I think missed a problem --

21 THE COURT: -- said everything was produced?

22 MR. SHEA: Judge Travers.

23 THE COURT: Shouldn't it be the Commonwealth saying  
24 everything was produced and the Judge say since everything has  
25 been produced according to the satisfaction of everybody --

1 MR. SHEA: Well, that's what the Judge --

2 THE COURT: Okay.

3 MR. SHEA: Yeah.

4 THE COURT: So that --

5 MR. SHEA: That's essentially --

6 THE COURT: So fairly --

7 MR. SHEA: -- what he said.

8 THE COURT: -- implied would be that everyone says we're  
9 ready to go so --

10 MR. SHEA: That's right. Yeah.

11 THE COURT: I appreciate the fact that there may have  
12 been an empty courtroom and the Judge would like to use the  
13 courtroom. We do that all the time for every kind of case.

14 But if they were ready to go, then even though it was  
15 only a three or four month period between indictment and  
16 trial, I don't see what the prejudice is.

17 MR. SHEA: Well --

18 THE COURT: If everyone agrees that all discovery's been  
19 provided, --

20 MR. SHEA: And then counsel for the defense went into --  
21 had an ex-parte in chambers conference with the Judge, can --  
22 which the Judge's memorandum says concerned trial strategy I  
23 believe was his term, which could very well have been looking  
24 for a second expert.

25 That's what Bielitz would say if I had produced Bielitz

1 to testify to that.

2 THE COURT: Well, there's a -- there's a --

3 MR. SHEA: And maybe -- maybe Ms. Bloomenthal would  
4 corroborate that, but I --

5 THE COURT: Is she in practice?

6 MR. SHEA: Yes.

7 THE COURT: What kind of work is she doing and where?

8 MR. SHEA: She's got a Nashua, New Hampshire address  
9 right now. I don't know what kind of work she's doing.

10 THE COURT: Well, let me ask you, what questions would  
11 you ask her in writing.

12 Well, --

13 MR. SHEA: I --

14 THE COURT: -- the questions that you would ask in --

15 MR. SHEA: Well, to --

16 THE COURT: What -- what questions would you be asking?

17 MR. SHEA: Okay. I -- I would say you -- you had  
18 meetings with Dr. Katsas on three occasions in June and July,  
19 tell me the substance of exactly what Dr. Katsas told you and  
20 what your questions to him were concerning preparation for  
21 trial.

22 THE COURT: Okay. Stop right there.

23 And that would be non-privileged because of the  
24 circumstances of the ineffective assistance claim brought by  
25 your client. So she would be -- she would not be able to hide



1 behind that -- I mean she would not be shielded by any  
2 privilege.

3 MR. SHEA: Right.

4 And she's fair game for the Commonwealth too, so I --

5 THE COURT: Next question.

6 MR. SHEA: Next question.

7 There was an ex parte status conference -- ex parte  
8 conference with Judge Travers just before trial in which he  
9 said you were looking for a continuance for strategic reasons.  
10 What was the basis for the request for continuance? Did Mr.  
11 Bielitz ever say to you, I don't think that Katsas is really  
12 coming up with much, we really ought to get a second  
13 pathologist in here to help us.

14 THE COURT: I don't quite like the phraseology. That --  
15 that's putting words into someone's mouth right now, as  
16 opposed to an open ended question about the reasons.

17 What else?

18 MR. SHEA: Did you get a written report from Dr. Kat --  
19 Katsas?

20 THE COURT: That's easy. Yes or no, please --

21 MR. SHEA: No --

22 THE COURT: -- provide.

23 MR. SHEA: No.

24 THE COURT: The answer is no?

25 MR. SHEA: Uh-huh.

1 THE COURT: Is that true?

2 MR. SHEA: That's right.

3 THE COURT: So you know that. So why would you ask that  
4 again?

5 MR. SHEA: I -- I'm telling you.

6 THE COURT: No, I'm asking you -- out of two questions  
7 that you would be presenting to her is that the -- is --

8 So would --

9 The decision not to go beyond Dr. Katsas as a -- as a  
10 defense expert, you say is ripe for ineffective assistance  
11 claim, and that it's based upon your -- the possibility that  
12 he was fairly in -- in -- in accord with -- with Dr. Zane's  
13 findings.

14 MR. SHEA: Yes.

15 THE COURT: And that's going to beg the big question, so  
16 what, and I use that -- that's my -- my -- my off handed  
17 expression to go to the next -- to the relevance issue.

18 How does that move the ball forward for a lawyer under  
19 the Saferian standard because that's the thing that dominates  
20 this, the ordinary, fallible, so why would he -- why -- why  
21 would a lawyer not -- why would -- why wouldn't the attorney  
22 be required to go beyond it?

23 MR. SHEA: Because the attorney would realize that she  
24 was going into trial unarmed against the authority of the  
25 OCME's --

1 THE COURT: Again --

2 MR. SHEA: -- pathologist.

3 THE COURT: But -- but that --

4 MR. SHEA: And she didn't --

5 THE COURT: -- that happens all the time.

6 MR. SHEA: She -- she should have asked --

7 THE COURT: That --

8 MR. SHEA: -- gone for second --

9 THE COURT: A second additional --

10 MR. SHEA: She should have asked for --

11 THE COURT: -- opinion.

12 MR. SHEA: -- a second --

13 All right.

14 THE COURT: But -- but -- but why? Why would that -- let  
15 me -- let me just --

16 MR. SHEA: Because --

17 THE COURT: -- throw --

18 MR. SHEA: -- I --

19 THE COURT: Let me throw something at you right now.

20 DNA. So the defense will -- will proactively get a DNA  
21 expert and they will review whether or not the DNA stuff was  
22 done at Cellmark or at the state lab or Boston Police Lab was  
23 -- was conform -- was in conformance with all the requisite  
24 standards, and they just want to make sure because that's what  
25 you're supposed to do as a lawyer.

1           And they come back and they say yeah, that's the DNA,  
2           that's the loci, that's the 17 places, and the defendant's  
3           stuff is there, it's inconclusive there, it is here.

4           Why -- why would --

5           Or take a driving under case, that the breathalyzer, if  
6           they're still using them, is a -- is -- is -- is -- is  
7           examined to see whether or not it was maintained, etcetera,  
8           etcetera, etcetera, and that the results of it were in  
9           conformance with industry standards, etcetera, why would he go  
10          for another opinion if he said yeah, it's -- everything's  
11          good?

12          MR. SHEA: The -- the instances that you cite are  
13          scientific evidence, as -- with -- without very much of a  
14          human input.

15          An autopsy is very much the -- the predisposition and the  
16          opinion of the pathologist that's doing the autopsy --

17          THE COURT: It might be, but it's still based upon the  
18          hard science and standards that you're presenting through  
19          Young and Baden and some of the representations made by the  
20          deceased Kessler.

21          I mean that's the heart of the science, the science is  
22          standards that -- that -- the science of an examination of --  
23          of -- of -- of the deceased for cause of death and path -- the  
24          science of pathology when it gets down to an issue of  
25          asphyxiation and whether or not the -- the stoppage of breath

1 could have been happening because of cardio, which is  
2 suggesting, or it could have happened because other inhaler as  
3 you suggested.

4 Or that because there's not supported by some of the --  
5 the physical evidence, such as petechia and the blood and the  
6 absence of things of that nature, those are all the science  
7 that you're giving me that is contradictory to the -- the Zane  
8 stuff.

9 So it's -- is -- of course there -- there's a human end  
10 of it.

11 But I don't -- when -- when does that become necessary?  
12 Why -- why -- why -- when -- when does a person have to get an  
13 additional opinion if -- if -- if you rely upon an expert  
14 that's independent, separately retained and makes all of the  
15 observations and has all the credentials, why do you -- why do  
16 you have to keep searching for another expert until you get a  
17 conclusion that's -- that's beneficial to you?

18 What -- where -- where is the law governing that?

19 MR. SHEA: Yeah. I -- I don't have law governing that.  
20 It's a -- a question of what is the -- the -- the first prong  
21 standard under Saferian which is what the -- what an attorney  
22 in south eastern Massachusetts prosecuting -- defending a -- a  
23 -- first degree murder case 20 years ago would have incident  
24 --

25 THE COURT: Do you have that?

1 MR. SHEA: Do I have that?

2 No.

3 That --

4 THE COURT: I -- I don't think you will. I don't know --  
5 I -- I -- there's -- there's -- it -- it does beg the question  
6 which more should they do.

7 So let's -- let's start just for a second, --

8 MR. SHEA: Well, if I could just add --

9 THE COURT: Go ahead.

10 MR. SHEA: -- add one thing?

11 I -- I go back to the cross-examination that should have  
12 been a red flag to the attorney. There must be something in  
13 this autopsy that could be cross-examined on and --

14 THE COURT: But wasn't it?

15 MR. SHEA: -- poked in it --

16 It was just -- it was --

17 THE COURT: Done weakly is what you think?

18 MR. SHEA: It was -- it was touched on and then backed  
19 away from, went onto another point --

20 THE COURT: Well --

21 MR. SHEA: -- and I --

22 THE COURT: -- let's go --

23 MR. SHEA: Has -- the inhaler, you didn't test the  
24 inhaler, did you, that kind of thing.

25 So -- but there were -- there are specific -- well, you

1 mentioned the eyes didn't have -- you know, petechiae in  
2 different --

3 THE COURT: Right.

4 MR. SHEA: -- organs, and --

5 THE COURT: The stuff in the lungs that had nothing to do  
6 --

7 MR. SHEA: And --

8 THE COURT: -- with asphyxiation.

9 MR. SHEA: Right.

10 And they should have been -- asphyxiated should have had  
11 in the eyes, and those -- those are the kind of questions that  
12 Katsas should have zeroed in on with her and say --

13 THE COURT: Well, let's -- let's forget about --

14 MR. SHEA: -- we've got --

15 THE COURT: -- Katsas --

16 MR. SHEA: -- we've got Dimeo's --

17 THE COURT: Forget about --

18 MR. SHEA: -- text book --

19 THE COURT: Forget about --

20 MR. SHEA: -- and --

21 THE COURT: -- Katsas doing it.

22 MR. SHEA: Yeah.

23 THE COURT: Forget about that.

24 So you would say that the ordinarily fallible lawyer in  
25 Southeastern Massachusetts in 1995 should have been conversant

1 with the text book of causes of asphyxiation and -- is that  
2 fair?

3 At least --

4 MR. SHEA: At -- at least should have explored them with  
5 her pathologist.

6 THE COURT: And it should have been drawn out.

7 In other words, you're going to say that that was the  
8 obvious science; is that fair?

9 MR. SHEA: Excuse me?

10 The obvious science?

11 THE COURT: The obvious science.

12 MR. SHEA: The ob --

13 THE COURT: The obvious science of it, which is that in  
14 the ordinary circumstances of suffocation, it will have ben,  
15 as you pointed out, and I think you gave some credible  
16 response -- basis for it, there's usually -- usually, not  
17 always the indication of struggle.

18 Is that one thing?

19 MR. SHEA: Yes.

20 THE COURT: There was usually the -- the erection of --  
21 of blood vessels and -- in the eyes; is that fair?

22 And --

23 MR. SHEA: Yes.

24 THE COURT: -- that the presence or absence of blood is  
25 an indication of -- of suffocation?



1 MR. SHEA: I --

2 THE COURT: Is that fair?

3 MR. SHEA: Presence or absence of blood is -- is --

4 THE COURT: Is not an indication --

5 MR. SHEA: -- indicative of the injuries that were  
6 observed on the body, and in this case, there was a complete  
7 absence of blood --

8 THE COURT: I'm not talking about that as a particular.

9 I'm saying as a general proposition, that if you'd done  
10 some research on suffocation, you would have learned that the  
11 absence or presence of blood is an indication of whether  
12 suffocation took place or did not take place?

13 MR. SHEA: I'm --

14 THE COURT: Those are --

15 MR. SHEA: I --

16 THE COURT: That was -- that was a softball for you. You  
17 should have hit that one out of the park. It's an easy one.

18 I assume you would say yes.

19 MR. SHEA: I -- I'm -- I'm not sure I understood the  
20 question. That's the --

21 THE COURT: I'm going through some of the things that a  
22 lawyer might be able to know -- let's suspend for a moment.

23 Okay.

24 COURT OFFICER: All right.

25 Defendant Snell is in the courtroom.

1 THE COURT: Okay. Thank you.

2 Good morning, sir.

3 THE DEFENDANT: Good morning, Judge.

4 THE COURT: You may be seated.

5 THE DEFENDANT: How are you?

6 THE COURT: I'm good.

7 Sit down, please.

8 THE DEFENDANT: Thank you.

9 THE COURT: I'm going to bring you up to date. What I  
10 indicated to counsel was I knew that you were -- you were a  
11 little bit further away than we had hoped for.

12 Secondly, I indicated that you're very welcome here of  
13 course today, but the -- the habe was not necessary to issue.  
14 There was some confusion about it.

15 Thirdly, I discussed with counsel some of the topics that  
16 we will discuss out of your earshot, and basically, it was the  
17 status stuff to -- to determine when and if and what a hearing  
18 would look like if an evidentiary hearing is going to be  
19 allowed.

20 And we're on the middle of it right now, and I'll bring  
21 you up to date a little bit more.

22 My inquiry has been on some of the witnesses that will be  
23 called to testify, and what I've learned was potentially two  
24 or three experts that are pathologists, and I also learned  
25 that one or two potential witnesses could be your prior

1 counsel, which would be Attorney Bloomenthal and possible Mr.  
2 Bielitz who was co-counsel with him.

3 I'm now discussing what the underlying foundational basis  
4 is for the ineffective assistance claim, and basically we've  
5 been focused on what more should Attorney Bloomenthal have  
6 done with regard to getting an additional pathologist to  
7 review your case file.

8 That's where we are right now.

9 I'll now let -- let you --

10 I just --

11 MR. SHEA: Yes.

12 THE COURT: I'm just --

13 MR. SHEA: You had a softball question that I didn't -- I  
14 would like you to repose because I don't think I understood --

15 THE COURT: The softball --

16 MR. SHEA: -- it.

17 THE COURT: -- question was if -- if a lawyer was going  
18 to be taking a suffocation case, you would probably expect  
19 that lawyer to be able to learn some of the basic principles  
20 that would be readily available through many of the best  
21 references.

22 We didn't have the internet then, but the best references  
23 probably would have indicated some of the -- some of the --  
24 the evidence that might exist when suffocation has been  
25 alleged.

1 MR. SHEA: Yes.

2 THE COURT: So --

3 MR. SHEA: And your question was whether blood or absence  
4 of blood would --

5 THE COURT: That was one of them.

6 MR. SHEA: I --

7 THE COURT: And obviously --

8 MR. SHEA: I --

9 THE COURT: -- that's part of your -- that's part of your  
10 motion, where you -- where you have raised a claim under one  
11 of the 25 different things that were failed to be done, to  
12 give support to the -- the Young and Baden, I think even  
13 Kessler's claim about the presence or absence of blood  
14 reflecting suffocation versus natural causes.

15 MR. SHEA: In general, I can't answer the -- the question  
16 that -- I -- I can't say that the -- the presence or absence  
17 of blood is a criterion for asphyxiation.

18 It -- I'm not aware of any of the literature --

19 THE COURT: Am I wrong on that?

20 I thought that you made great efforts to be able to say  
21 that -- that there was no discernable blood at the -- that had  
22 there been blood, it would have been consistent with trauma --  
23 it would have been a -- resistance -- physical resistance,  
24 which --

25 MR. SHEA: Well, yeah.

1 THE COURT: -- often accompany suffocation.

2 MR. SHEA: Well, that's -- I --

3 THE COURT: All right.

4 MR. SHEA: Yeah.

5 THE COURT: Let me move on.

6 MR. SHEA: Yeah. I --

7 THE COURT: Let me --

8 MR. SHEA: Yeah.

9 THE COURT: My question to you is --

10 MR. SHEA: Right.

11 THE COURT: -- my question -- my question to you is what  
12 more -- when you -- when you raised -- when you lob over the  
13 issue that there was ineffective cross-examination, what more  
14 should she have asked based upon what she should have known  
15 and what she did know?

16 MR. SHEA: Well, what she did have was the state  
17 laboratory results testing the bedding and the pillow which  
18 indicate that there was no bleeding apparent.

19 And the -- where I was having a problem with your  
20 question was --

21 THE COURT: Forget about --

22 MR. SHEA: -- the reason --

23 THE COURT: -- my question.

24 MR. SHEA: -- it was -- well, the reason there was  
25 supposed to be bleeding in this case was because the injuries

1       were supposed to be inflicted at the time of death when the  
2       heart was still pumping.

3               THE COURT:   Right.

4               MR. SHEA:   And we have a -- we have experts who say that  
5       the absence of blood was very indicative that those injuries  
6       either occurred after death or before death --

7               THE COURT:   Again --

8               MR. SHEA:   -- not during the actual --

9               THE COURT:   I understand.

10              MR. SHEA:   -- homicide.

11              THE COURT:   Yeah.

12              MR. SHEA:   I --

13              THE COURT:   Again, I was --

14              MR. SHEA:   Yeah.

15              THE COURT:   -- short circuiting it.

16              MR. SHEA:   Yeah.

17              THE COURT:   I was short circuiting it, and the -- and --  
18       and you -- your proposition is that -- is that it would have  
19       happened during the two or three days of the relative  
20       decomposition of the body, and/or --

21              MR. SHEA:   And the movement of the body.

22              THE COURT:   -- it happened at a prior time.

23              MR. SHEA:   Uh-huh.

24              THE COURT:   So that's -- that's generally where we are  
25       with the ineffective assistance.

1           And with regard to the Brady issue, how would you -- how  
2 would you attempt to prosecute that claim other than on the  
3 papers?

4           MR. SHEA: Well, it may be that the -- it -- it may be  
5 that the file -- the OCME discloses that -- shows that  
6 something was communicated to the trial -- the ADA that tried  
7 the case that was not disclosed. That would be the highest  
8 level of misconduct, if --

9           THE COURT: Okay.

10          MR. SHEA: -- it --

11          THE COURT: That's a fishing expedition.

12          MR. SHEA: That's a fishing ex -- right.

13          But --

14          THE COURT: All right.

15          MR. SHEA: -- that's the -- we go down one level of  
16 exculpatory evidence, and it is the duty of the OCME to  
17 disclose all information in the -- in the file of the  
18 pathologist, which tends to prove innocence in general terms.

19          And if he in fact was under the restrictions which Dr.  
20 Kessler states that he was under, that would have made a  
21 significant impact on the jury to know --

22          THE COURT: No, that's different.

23          I'm talking about Brady misconduct. I'm talking about  
24 what they knew and what they should have disclosed. That --  
25 I'm talking about the District Attorney's responsibilities.

1           So we can find out if discovery is allowed whether or not  
2 those things exist.

3           MR. SHEA: Yes.

4           THE COURT: But what you have right now, to -- to -- to  
5 -- to start the ball going, and this is where I'm going to go  
6 in a moment --

7           THE DEFENDANT: I can answer the question.

8           THE COURT: No, we don't --

9           THE DEFENDANT: Okay.

10          THE COURT: -- do it that way.

11          That's why -- you just sit down and listen, sir. I'll  
12 give you a chance to speak to your counsel at any time, but we  
13 -- my interest right now is really to -- to finally get into  
14 the discovery issues in a -- in a -- in a broad sweep around  
15 it, moving -- moving back to it.

16          The -- I'm going to ask you one question, and then the  
17 District Attorney is going to stand up and tell me yes or no.

18          You alleged that the OCME is an agent for the  
19 prosecution.

20          MR. SHEA: Yes.

21          THE COURT: I understand the very, very tight binds of  
22 it, so I know that the OCME is -- is charged with the  
23 examination of -- of unattended deaths, sudden deaths, and I  
24 understand that they're an integral part of the prosecution,  
25 but that's a big difference between being an agent.



1           MR. SHEA: I think there's case law that says that they  
2 are under a -- disclosure -- exculpatory evidence disclosure  
3 requirement that --

4           THE COURT: That's not what I said. You've said that  
5 they're agents.

6           MR. SHEA: Right. For disclosure purposes.

7           They -- they work hand in glove with the --

8           THE COURT: I know that they work in hand in glove.  
9 First of all, their mandate statutorily is for, I'm going to  
10 use the word ineffectively of first response.

11           They're the ones that are charged with the examination of  
12 the body for sudden death for an unattended death is the word  
13 we use right now.

14           And that they're -- they are charged with making an  
15 examination of cause of death and a few other things I'm  
16 leaving out.

17           They are an entity that has -- the -- for which there is  
18 certainly no indicia of -- of principal agency, other than  
19 being a separate executive branch of government.

20           When you talk about agency, it's almost like the ability  
21 of Michael O'Keefe today being able to fire the OCME personnel  
22 which clearly doesn't exist.

23           Now, you use the word agency --

24           MR. SHEA: Right.

25           THE COURT: -- and that imports something as to their

1 responsibilities and the use -- and let me finish -- and the  
2 or -- ordinary -- and again, I'll use it in the -- in the  
3 general legal vernacular, that a -- that the acts and  
4 omissions of the agent are going to be attributable to the  
5 principal.

6 MR. SHEA: I would like to back off from the term agent.

7 I would rely simply upon the Woodward case and other  
8 cases that indicate that police or OCME that are working with  
9 the prosecution on the specific case are required to disclose  
10 exculpatory evidence to the prosecution so that it can be  
11 turned over to the defendant.

12 THE COURT: But that's --

13 MR. SHEA: I think the case law is --

14 THE COURT: But there's -- there's -- there's -- but  
15 that's not an issue right now for me.

16 My question is whether or not they were culpable under a  
17 Brady consideration, and I don't think --

18 MR. SHEA: But --

19 THE COURT: -- looking --

20 Woodward doesn't stand for that.

21 MR. SHEA: ADA O'Keefe personally, you mean?

22 THE COURT: No. I'm speaking about whether or not their  
23 office is chargeable with failure to disclose to you  
24 collectively, the defense counsel, information that was  
25 exculpatory.

1 MR. SHEA: That --

2 THE COURT: If -- if they didn't know it.

3 MR. SHEA: They had an obligation to inquire, number one.  
4 If they did not inquire, they -- for exculpatory evidence,  
5 that would be a failure of the District Attorney's Office.

6 If they knew -- if they did inquire and they found out  
7 and did not disclose it, that would be a more serious  
8 violation.

9 But even if they did neither of those things, we still,  
10 under Brady, it's clear that the OCME has the duty to come  
11 forward and say here is exculpatory evidence.

12 And if we find it after the fact, as we claim we have, it  
13 is newly discovered and it is exculpatory.

14 THE COURT: Okay. Let's leave it alone.

15 What's your position on whether or not there is a -- an  
16 obligation -- what -- what's your position on whether or not  
17 you fail -- you collectively, your office failed to disclose  
18 exculpatory evidence.

19 MS. SWEENEY: Well, the OCME is not an agent of our  
20 office --

21 THE COURT: And that's --

22 MS. SWEENEY: -- for one.

23 THE COURT: -- just been kind of --

24 MS. SWEENEY: Are they under our umbrella.

25 THE COURT: Okay. That's just --

1 MS. SWEENEY: So --

2 THE COURT: Just -- just for purposes, I -- I thought --  
3 that -- that's been withdrawn as a --

4 MS. SWEENEY: Okay.

5 THE COURT: -- as an issue.

6 But the OCME does have information, perhaps, and if they  
7 do have that information, they should be telling you  
8 something. And the something that they should have told you,  
9 they say, would have been some of the laboratory restrictions  
10 on Dr. Zane at -- etcetera.

11 MS. SWEENEY: There wasn't --

12 THE COURT: Leaving --

13 MS. SWEENEY: -- a request --

14 THE COURT: Leaving alone -- leaving alone for a second.

15 Now, my question to you is can you represent to the Court  
16 whether your office collectively knew any of the allegations  
17 raised by the -- the Kessler letter?

18 MS. SWEENEY: I can state that we requested the  
19 information that they asked for in the initial discovery order  
20 back during pretrial, and that none of this was requested.

21 And so therefore, since they're not an agent, we wouldn't  
22 have known about it.

23 THE COURT: Okay. So -- I'll make it very simple.

24 Did you know or did you not know that -- that -- that  
25 Zane was prohibited from conducting unsupervised homicide

1       autopsies?

2               MS. SWEENEY: I have not inquired of the prosecutor of  
3 this case as to that question, so I can't give you a clear  
4 answer, other than we turned over what was requested --

5               THE COURT: Well --

6               MS. SWEENEY: -- in the --

7               THE COURT: -- you have to do that.

8               MS. SWEENEY: -- initial --

9               THE COURT: This is -- this is where --

10              MS. SWEENEY: I don't think --

11              THE COURT: This is --

12              MS. SWEENEY: -- that I need to ask the DA if he was  
13 aware --

14              THE COURT: Well, there's --

15              MS. SWEENEY: -- that there was --

16              THE COURT: -- a claim --

17              Let -- let -- let -- there's a claim -- there's a claim,  
18 and -- and you know when I talked about softball questions, I  
19 would assume that if the trial attorney knew that -- and  
20 again, that's a big jump ball right now.

21              Kessler says that -- that he -- Kessler, who had  
22 authority over -- over Zane says that he was not to be doing  
23 homicide autopsies unsupervised, period.

24              MS. SWEENEY: But your question --

25              THE COURT: No, no.

1 MS. SWEENEY: -- presupposes --

2 THE COURT: No. It's not --

3 MS. SWEENEY: I would assume that if that were done, and  
4 there was an inquiry made during the trial, if I remember  
5 correctly, of whether or not there was any either -- either it  
6 was implicit in the testimony or it was direct in the  
7 testimony, that he had no supervision, that there was no  
8 supervisory role performed by anyone in the medical examiner's  
9 office.

10 It was -- it was done entirely by him. That's what I  
11 think the state of the trial evidence was; am I correct?

12 MS. SWEENEY: Yes.

13 THE COURT: All right.

14 MS. SWEENEY: Based on --

15 THE COURT: If --

16 MS. SWEENEY: -- the transcript --

17 THE COURT: -- the --

18 MS. SWEENEY: -- yes.

19 THE COURT: If the trial counsel knew that he should not  
20 have been doing it, I would assume that he or she would have  
21 conveyed to defense counsel that fact?

22 MS. SWEENEY: Correct.

23 THE COURT: And that's an easily verifiable fact, so  
24 that's an issue. That's an issue right now.

25 But now I want to ask you, are you challenging -- let's

1 go back to what -- where we are for discovery.

2 Are you challenging the authenticity of the Kessler  
3 letter?

4 MS. SWEENEY: Yes. I'm challenging the --

5 THE COURT: Not its admissibility, its authenticity.

6 MS. SWEENEY: The authenticity as far as the -- just, you  
7 know, random allegations in there and the timeframe of --

8 THE COURT: That's not --

9 MS. SWEENEY: -- when --

10 THE COURT: -- what I said.

11 There's a letter that was sent to Mr. Pelletier or with  
12 his signature, the stamped signature of Kessler. Are you  
13 challenging whether or not Kessler himself actually sent that  
14 to Pelletier?

15 MS. SWEENEY: Yes.

16 THE COURT: You are?

17 MS. SWEENEY: Uh-huh.

18 THE COURT: Well, that's a big jump. So you're saying  
19 that someone's telling a big lie?

20 MS. SWEENEY: I'm saying that we have an unsigned letter  
21 or affidavit or whatever it is, that doesn't --

22 THE COURT: Well, I have a -- a --

23 So you think that Pelletier is committing a fraud on the  
24 Court?

25 MS. SWEENEY: No. I think that the chain of custody as

1 to how this evidence or how this information came to light is  
2 relevant to the proceedings that we have today.

3 THE COURT: Well, when we go to -- well, we're on  
4 authenticity. I understand trial Court authenticity. Certain  
5 things can be accepted with -- with a -- with the -- with the  
6 -- with the certification by the business person that comes in  
7 and authenticates or self-authenticating this.

8 I know we have letters that are sent back and forth.

9 The presence or actions of the -- of the signed signature  
10 could give pause, just like there's a lot of speculation over  
11 here as to whether or not there should have been a third  
12 opinion on this.

13 But Pelletier, I thought, was able to establish through  
14 some chain of production that indeed he sent the letter or  
15 sent the request and that in response to that, he got this  
16 letter back.

17 MS. SWEENEY: Yes.

18 THE COURT: So if I had Mr. Pelletier in here testifying,  
19 why would that not be -- establish the authenticity of the  
20 letter sent?

21 It doesn't -- doesn't -- it doesn't mean that it's  
22 admissible when -- when the -- but -- but if he says so, how  
23 would you challenge that?

24 MS. SWEENEY: I would like to inquire of Attorney  
25 Pelletier, and I've worked with him before on cases and I have



1 no issue with him as an attorney.

2 But as to how this letter or affidavit came to light --

3 THE COURT: It's not --

4 MS. SWEENEY: -- in --

5 THE COURT: -- an affidavit. It's a letter.

6 MS. SWEENEY: Right.

7 THE COURT: It -- it -- it did not become an affidavit  
8 because the man died.

9 MS. SWEENEY: Right.

10 THE COURT: And it did not become a sworn statement  
11 because he died.

12 MS. SWEENEY: And the circumstances and if they had a  
13 conversation regarding this, so that's the concern of the  
14 Commonwealth --

15 THE COURT: I'll tell you what.

16 MS. SWEENEY: -- at this point.

17 THE COURT: I'm going to leave you free to be able to  
18 explore it. I'm going to accept it as being a letter that was  
19 sent from Kessler.

20 Now, whether or not those opinions are going to be  
21 admissible in the trial is a -- is a very big jump ball. And  
22 I appreciate why. It's called confrontation.

23 MS. SWEENEY: Yes.

24 THE COURT: Now, where -- where do you stand on the issue  
25 of waiver? When -- when was any of the stuff that's now

1 presented in its hopefully final form, to wit the claims made  
2 by the defendant via the expert witnesses?

3 Forget about Kessler. Kessler's letter stands for -- his  
4 opinions will never be able to be presented at a hearing. If  
5 Kessler said that there are other things that he should have  
6 -- that he should have done and you object to that obviously,  
7 then clearly Kessler's letter substantively, notwithstanding  
8 the defense position, -- well, let's leave it this way, it's a  
9 problem.

10 But the other stuff, where -- where has that stuff ever  
11 been disclosed?

12 Forgetting about -- forgetting about the ineptness of  
13 counsel for not doing it or --

14 MS. SWEENEY: Uh-huh.

15 THE COURT: -- the failure to cross-examine or all the  
16 opportunities.

17 But where has -- where has it ever been disclosed to a  
18 Judge?

19 MS. SWEENEY: So it -- is your question -- sorry to  
20 clarify. It --

21 THE COURT: I'm trying to find out --

22 MS. SWEENEY: Waiver --

23 THE COURT: -- what --

24 MS. SWEENEY: What issues are waived and what issues --

25 THE COURT: Yeah.

1 MS. SWEENEY: -- are not?

2 THE COURT: Well, I'm going to ask you -- I don't want to  
3 go to waiver. Waiver is get -- getting very, very technical  
4 in -- in the sense of what should have been raised.

5 I'm going to ask you substantively when was the stuff  
6 that's now in front of me presented either to a jury which we  
7 agree it was not, I hope we can agree it was not, because of  
8 contradictory opinions.

9 Where was it raised in any post-conviction proceeding?

10 MS. SWEENEY: The two motions for new trial addressed  
11 whether or not the defendant --

12 THE COURT: Which one --

13 MS. SWEENEY: Well, the defendant claims --

14 THE COURT: -- are we speaking of particularly?

15 MS. SWEENEY: IN the first motion for new trial, the  
16 defendant -- which was consolidated with the main appeal so  
17 that issue when to the SJC.

18 THE COURT: Yeah.

19 MS. SWEENEY: The defendant claimed ineffective  
20 assistance of counsel, and even though you just said you  
21 didn't want to know that, but that was --

22 THE COURT: No --

23 MS. SWEENEY: -- the main issue in the first one.

24 In his direct appeal, he raised the issues that he's  
25 raising now about whether or not the victim died of natural

1 causes --

2 THE COURT: Correct.

3 MS. SWEENEY: -- and the --

4 THE COURT: And --

5 MS. SWEENEY: -- inhaler issue.

6 THE COURT: Hold it. Don't go on.

7 What did he raise in terms of the substance of the  
8 evidence to -- to -- to contradict it? What was raised in --  
9 during his direct appeal, following the denial of the motion  
10 for a new trial?

11 MS. SWEENEY: Just whether or not the victim had -- was  
12 -- whether or not there was ineffective assistance of counsel  
13 and whether or not the victim died of natural causes, and  
14 whether or not the medical examiner failed to conduct  
15 additional tests, including the inhaler which he raised now.

16 That was the first motion for new trial. That one was  
17 appealed directly to the SJC. They affirmed the conviction,  
18 33E review.

19 The second motion for new trial, again was that the  
20 victim --

21 THE COURT: What date?

22 MS. SWEENEY: I want to say 2005?

23 THE COURT: 5? I think it was.

24 MS. SWEENEY: So the second motion for new trial, the  
25 defendant claimed against that the victim's death was not

1       caused by natural causes, and then he also claimed that  
2       somebody else was the murderer.

3               Then he again raised the ineffective assistance issue  
4       that was --

5               THE COURT:   What happened --

6               MS. SWEENEY:  -- addressed --

7               THE COURT:  -- with that motion?

8               Where is the memorandum of decision or an order denying  
9       it?

10              MS. SWEENEY:  It -- it was denied as per the clerk's  
11       file.  I don't believe I filed a copy of it with my -- it was  
12       just denied outright by the Judge.

13              I don't believe it was a Trial Judge that denied the  
14       second one.  I think it was Judge Cannon that denied the  
15       second one, and Travers that denied the first one.

16              THE COURT:  Travers --

17              MS. SWEENEY:  And there was --

18              THE COURT:  -- was the Trial Judge --

19              MS. SWEENEY:  Right.

20              THE COURT:  -- that denied it post-conviction, and then  
21       --

22              MS. SWEENEY:  In the second --

23              THE COURT:  -- it went to --

24              MS. SWEENEY:  - one --

25              THE COURT:  -- the SJC.

1 MS. SWEENEY: The second one was just denied outright. I  
2 don't believe that there were any findings. The first one --

3 THE COURT: Was there any presentation of contradictory  
4 expert testimony --

5 MS. SWEENEY: No.

6 THE COURT: -- at any point to any Judge?

7 MS. SWEENEY: No.

8 THE COURT: Okay. Let's -- so this is -- and whether or  
9 not it should be raised today is -- is your objection in terms  
10 of waiver; is that fair?

11 MS. SWEENEY: Yes.

12 THE COURT: Who was the Trial Counsel for the 2005 motion  
13 for new trial by -- in front of Judge Connon?

14 MS. SWEENEY: You know, I'm -- I apologize. I don't  
15 think I know. There's been so many --

16 THE COURT: Well, was it --

17 MS. SWEENEY: -- different --

18 THE COURT: -- pro se --

19 MS. SWEENEY: -- attorneys.

20 THE COURT: -- motion?

21 MS. SWEENEY: No. That was the third motion for new  
22 trial.

23 MR. SHEA: No, this is the third motion for new trial.

24 THE COURT: I think it was pro se.

25 MS. SWEENEY: The third one was pro se.

1 The --

2 MR. SHEA: I'm --

3 THE COURT: The second one --

4 MS. SWEENEY: -- second one, there was an attorney.  
5 I don't know off the top of my head.

6 THE COURT: Is it Mar -- Marmar?

7 MS. SWEENEY: I know Any -- Amy Belger was in --

8 THE DEFENDANT: No.

9 MS. SWEENEY: -- at one point, but I don't think she  
10 filed --

11 THE DEFENDANT: No.

12 MS. SWEENEY: -- anything.

13 THE COURT: She filed something and then it was denied --

14 THE DEFENDANT: Discovery.

15 THE COURT: -- by me because -- because she was looking  
16 for a discovery request without a -- a pending motion in front  
17 of me.

18 THE DEFENDANT: Right.

19 THE COURT: And that -- that -- that invited arguably  
20 this further motion.

21 Okay.

22 MS. SWEENEY: I can certainly get that back to you. I --  
23 I don't know off the top of my head.

24 THE COURT: So let's talk about the OCME.

25 Counsel, you're objecting to the production. Can you

1 tell me why?

2 MR. HOGBERG: Yes.

3 THE COURT: Please.

4 MR. HOGBERG: Good morning, Your Honor.

5 I am new to the OCME but I am getting up to speed on this  
6 lengthy history in this case.

7 THE COURT: You know what, you don't -- and I -- and I'm  
8 saying this respectfully. I don't think you have to care too  
9 much about the lengthy history of it.

10 The question will be, a Court is always very sensitive to  
11 potentially privileged or confidential or -- or records that  
12 -- that -- that may or may not be within the purview of the  
13 public records.

14 So clearly, the person on trial is not a public record  
15 document. That's easy. But that does not mean that it's  
16 exempt from review so long as you go through certain steps.

17 And my question to you is -- is you certainly should, as  
18 a matter of general practice, object to -- or probably have a  
19 standing objection to any production of any confidential  
20 personnel records.

21 So I'm there with you on that part because I understand  
22 that is it -- is it Chapter 6, Section 4, or is it Chapter 4,  
23 Section 6 --

24 MR. HOGBERG: Chapter 4, Section --

25 THE COURT: Section 6?



1 MR. HOGBERG: -- 7.

2 THE COURT: Six; isn't it?

3 MR. SHEA: Seven.

4 THE COURT: Seven?

5 MR. HOGBERG: Chapter 4, Section 7 --

6 THE COURT: Yeah.

7 MR. HOGBERG: -- 26C.

8 THE COURT: Yeah.

9 MR. HOGBERG: Correct.

10 THE COURT: So I'm familiar with it.

11 MR. HOGBERG: Yeah.

12 THE COURT: And so we now know that the -- not to be  
13 produced except by procedure -- fair procedure and by a Court  
14 order; fair?

15 MR. HOGBERG: Fair. And on that note, Your Honor, this  
16 issue was raised subsequent to a public records request, I  
17 believe -- I believe from 2012, for a number of documents,  
18 essentially in Dr. Zane's file.

19 This was appealed a number of times. It's all -- it's  
20 still pending before the SJC.

21 THE COURT: By him?

22 MR. HOGBERG: Yes.

23 THE COURT: So -- so --

24 MR. HOGBERG: And --

25 THE COURT: -- that's one thing, but that's not -- it's

1 not -- it's -- the reason that we're here today is because --  
2 is it Belger? Attorney Amy Belger?

3 She is the one that actually filed the motion for  
4 discovery without having the -- did not disclose what the --  
5 what the motion -- what the -- what the motion -- what the --  
6 what the motion for new trial was to be able to -- to be able  
7 to use all of the requisite touch stones of relevance.

8 MR. HOGBERG: Okay.

9 THE COURT: And so that was easy for me, and I denied it.

10 I denied it without prejudice. So the motion has now  
11 been filed, and -- and the -- and the -- and the -- and the --  
12 arguably relevance is -- is now -- I've got 60 pages of -- of  
13 memoranda from the defendant.

14 So my question is, do you think that has any bearing on  
15 today's proceeding because it was -- because the fact that it  
16 was a public record request, and it was denied, sounds like  
17 it's good law.

18 But just because it's a public record doesn't mean that  
19 -- that it -- it cannot be subject to a Court order for  
20 production.

21 MR. HOGBERG: I understand.

22 THE COURT: Do you agree with that?

23 MR. HOGBERG: Yes. And I -- I raised that just to inform  
24 --

25 THE COURT: Yeah

1 MR. HOGBERG: -- Your Honor --

2 THE COURT: No, no, I understand it.

3 So I -- and -- and I would say to you that I will always  
4 be circumspect with anything that's confidential, particularly  
5 victim therapeutic records, everything, everything --  
6 everything attorney-client, we're always trying to get the  
7 balancing act.

8 MR. HOGBERG: Right.

9 THE COURT: In particular, what would you object to in  
10 terms of the production for -- for these records?

11 MR. HOGBERG: I -- I --

12 THE COURT: Without telling me what the -- what it is,  
13 but you -- you might want to say topically.

14 MR. HOGBERG: I --

15 THE COURT: And --

16 MR. HOGBERG: In -- in general, I'd -- as you stated, a  
17 standing objection to personnel records. And I think the --  
18 the -- you know, our office's position is that it -- it would  
19 set a bad precedent across the board for production of  
20 personnel files.

21 And -- and the standard, obviously, that we're most  
22 familiar with is the public records standard, and --

23 THE COURT: But I --

24 MR. HOGBERG: It --

25 THE COURT: -- you -- you've got every right in the world

1 to object, and I -- and -- and no Judge should order it unless  
2 there is a compelling reason for it.

3 And that is usually under the standards of Rule 17, and  
4 -- and it -- it -- it follows the balancing test.

5 MR. HOGBERG: Yes.

6 THE COURT: And what I would -- you know, when you tell  
7 me that you don't want an employee's private records  
8 disclosed, it -- it could very well be a source of great  
9 embarrassment.

10 It could also be a source of great acclamation. He did a  
11 wonderful review and you're going to get the Christmas bonus  
12 this year, or it could be that you're going to be discharged  
13 if you ever do that again. So I appreciate the sanctity --  
14 not -- not sanctity but the -- the basis for the  
15 confidentiality, but I'm trying to -- I'm trying -- I want to  
16 make sure that any interest that you have for the particular  
17 case before us today --

18 MR. HOGBERG: Uh-huh.

19 THE COURT: -- are raised for me.

20 MR. HOGBERG: And --

21 THE COURT: So --

22 MR. HOGBERG: -- I think the specifics are -- and going  
23 back to -- I know we kind of hashed out the Kessler issue, but  
24 it's my understanding he was a disgruntled former employee who  
25 in fact made false accusations against OCME employees in the

1 past which is documented. I believe it was the McGowan case.

2 THE COURT: I'm aware of that.

3 MR. HOGBERG: So I --

4 THE COURT: I'm aware --

5 MR. HOGBERG: You know, it's just --

6 THE COURT: -- of it. I'm aware that there was bad blood  
7 between Zane and Kessler. I understand that.

8 MR. HOGBERG: Okay.

9 THE COURT: And I understand that it was already the  
10 subject of further proceedings in this Court because it was --  
11 Commonwealth v. McGowan, and I understand that there -- there  
12 was some -- some -- some open to dicta or statement by the  
13 Trial Judge or the Motion Judge and Trial Judge to that  
14 effect.

15 But that doesn't mean that it's not accurate; is that  
16 fair?

17 It's something to consider though.

18 MR. HOGBERG: Sure.

19 THE COURT: Some of the stuff that's rather benign, I  
20 think, would be responsive to the claim as to any of the  
21 privileges that he had, and that would be the privilege to be  
22 able to work supervised or unsupervised.

23 Why would that not be something that, if it's there,  
24 should not be disclosed?

25 MR. HOGBERG: I -- well, my argument to that would be Dr.

1 Zane was -- he testified and cross-examined at trial, and that  
2 would have -- I would argue -- I would argue that that's just  
3 not ripe for argument at this point.

4 THE COURT: Why?

5 MR. HOGBERG: Because he had -- if there was any  
6 opportunity to -- to question him on that at trial.

7 THE COURT: You wouldn't know it.

8 MR. HOGBERG: I -- I -- I don't know it, I -- I was not  
9 part of the --

10 THE COURT: Go backwards. I understand that.

11 The question is if -- if it's being claimed from Kessler,  
12 regardless of any motivation he may have had, that he didn't  
13 have the right to be able to conduct unsupervised autopsy --  
14 homicide autopsies, then let me lay it out for you. That  
15 would be very relevant at the trial because the whole case --  
16 well, there's quite a bit of circumstantial evidence that the  
17 jury considered. That's the context of the case.

18 MR. HOGBERG: Right.

19 THE COURT: But when you get down to a principal claim of  
20 -- in dispute, which is the cause of death, then everything  
21 is going to be guided probably by the consideration that we  
22 now give to the jurors under, I think it's Commonwealth v.  
23 King.

24 The expert witness instruction that's a model  
25 instruction, and the jury will be told to closely scrutinize

1 the training and the background of the -- of the -- of the  
2 expert to closely scrutinize the training and experience, and  
3 to closely scrutinize the basis of the opinion and the  
4 reliability of the opinion.

5 And it's a very --it's a -- it's a -- it's a -- it's a  
6 pretty -- pretty strongly worded instruction, and Rule 702, I  
7 think, is the one that the instruction is guided by, but those  
8 are the -- those are the very critical elements for the expert  
9 witness to -- to -- to -- those are the -- for the jury to  
10 consider.

11 Those are the elements that a jury should consider for  
12 the -- for the -- for the final expert opinion. So if he was  
13 not able to conduct an unsupervised homicide autopsy, I think  
14 that's very, very relevant to what the jury should consider.

15 And if it's in there, I see no reason why it should not  
16 be produced.

17 So --

18 MR. HOGBERG: I -- Your Honor, I -- I can -- I can agree  
19 with your --

20 THE COURT: Okay.

21 MR. HOGBERG: -- position on that.

22 But my -- my argument is -- and -- in my limited trial  
23 experience, I do know in expert witnesses, there's a large  
24 portion of testimony that goes into knowledge, experience, and  
25 background, so I would say that any -- whether known or not

1 known, the cross-examination --

2 THE COURT: I don't agree with you. I actually have --

3 MR. HOGBERG: -- should ask --

4 THE COURT: -- a lot of trial experience.

5 MR. HOGBERG: Would ask the --

6 THE COURT: And --

7 MR. HOGBERG: -- background, and -- and --

8 THE COURT: That's not --

9 MR. HOGBERG: -- qualifications to do --

10 THE COURT: That's not --

11 MR. HOGBERG: -- with the --

12 THE COURT: That's not how it works though.

13 MR. HOGBERG: Okay.

14 THE COURT: What happens is that the -- if he -- if -- if  
15 he was not entitled to it, then someone should have told the  
16 defendant, and I'm not going to at this point hold the  
17 Commonwealth responsible for a Brady infraction on that.

18 But if it -- if it exists, then that fact ought to be  
19 disclosed, and so I don't have any problem with -- with that  
20 fact coming out because I don't think that fact -- that fact  
21 itself would violate any of the intended confidentiality  
22 protections for the employee.

23 MR. HOGBERG: Okay.

24 THE COURT: So I don't have a problem with -- with at  
25 least that coming out in some way.



1           Now the second part of it, that's raised, and now I'm  
2           trying to job my memory, was the existence or the nonexistence  
3           of -- of the Harrison Ave high tech, quote/unquote, according  
4           to Kessler examination at that morgue versus the Pocasset one.

5           And whether or not there were any internal protocols or  
6           any directions to -- to Zane to follow certain protocols.

7           So they're raising a claim that had -- had they followed  
8           the protocols --

9           Kessler said the protocol should have been -- in these  
10          circumstance, the body should have been shipped up to Boston  
11          in the south end and be examined at the medical -- at the --  
12          at the -- at the Harrison Ave City Hospital --

13          MR. HOGBERG: Okay.

14          THE COURT: -- facility.

15          Instead, it was done at a less than state of the art  
16          facility in Pocasset.

17          And notice no one can presently say that it -- it -- it  
18          was wrong to do it in Pocasset, but I believe that Kessler  
19          says that there was protocol established when it should have  
20          been.

21          Is -- is -- is that your position a little bit?

22          MR. SHEA: Yes.

23          THE COURT: So if you were to disclose that, why would  
24          that be antagonist to any of the intended protections that --  
25          that the Section 23, Chapter 4, section seven provisions are?

1 MR. HOGBERG: I -- I don't know the --

2 THE COURT: I don't -- nobody's going to be humiliated or  
3 embarrassed by a simple disclosure of what the standards are.

4 MR. HOGBERG: I couldn't say whether they would be or  
5 not. I don't -- I don't know the --

6 THE COURT: Well, you're not going to embarrass anyone.

7 MR. HOGBERG: Well --

8 THE COURT: It sounds like a good standard.

9 If -- if you have a standard to say listen, if it -- if  
10 --- if -- if you ever have a need for trace evidence  
11 disclosure, and it could very well happen in certain kinds of  
12 cases in homicide, then hey, come on up to Boston and don't  
13 rely on the local office to do it.

14 And -- and I'm just putting it into --

15 MR. HOGBERG: Sure.

16 THE COURT: It's a very benign standard. It doesn't  
17 impact the stuff like the psychiatric record would.

18 MR. HOGBERG: Right. Okay.

19 THE COURT: It doesn't impact something about perhaps an  
20 employee who could very well have some -- some substance abuse  
21 issues that are not relevant --

22 MR. HOGBERG: Uh-huh.

23 THE COURT: -- to any case or had matrimonial problems  
24 that somehow or other evolved into a discussion about why or  
25 how a person should be suspended or fired and -- and

1       disciplined.

2               MR. HOGBERG:   Sure.

3               THE COURT:   That's no one's -- there's no public concern  
4       for it.

5               MR. HOGBERG:   No, I understand.   It's a procedural issue,  
6       and --

7               THE COURT:   So --

8               MR. HOGBERG:   -- as a matter of practice I guess.

9               THE COURT:   -- those two facts are actually rather benign  
10       I think, whether or not there was a -- a -- a -- a -- if the  
11       doctor was told not to conduct an unsupervised homicide  
12       autopsy, that's true, then it might be embarrassing to Dr.  
13       Zane, but it also would be contradictory to this -- the  
14       evidence that was presented at trial because he would have --  
15       she should have comported with that very basic fundamental  
16       procedure.

17               There's a lot to be made about some of the -- there's  
18       also a basis for this, and I know that the Commonwealth has a  
19       position that some of it's just news articles, but there was  
20       also cases that were cited where there -- there was findings  
21       of -- of negligence and/or incompetence.   So it's not like  
22       it's a fishing expedition to say that Zane did or did not  
23       comply with good pathology procedures if -- if these cases  
24       that -- there were six of them that were listed if I believe  
25       correctly.

1           The -- and also, was it ever disclosed during trial --  
2           there's an allegation from Kessler or from Baden or one of the  
3           others, Friedlander, that there was a mix up about the  
4           examination of some of the tissue, and he was examining some  
5           of the children's tissue, was it --

6           Counsel, you -- you indicated that that's a problem, but  
7           was that -- was that something that you learned?

8           MR. SHEA: That was discovered by Dr. Friedlander --

9           THE COURT: Okay.

10          MR. SHEA: -- who was --

11          THE COURT: After the trial.

12          MS. SWEENEY: Post --

13          MR. SHEA: Yeah.

14          MS. SWEENEY: -- conviction.

15          THE COURT: Post conviction. Okay.

16          And I was just trying to find out --

17          So the issue of -- if that is a -- if -- if that has some  
18          reliability today post-conviction, then it certainly is  
19          germane as to whether or not there are other instances of --  
20          of -- of alleged incompetence that -- that -- that may have  
21          been raised throughout the cases, and it might be embarrassing  
22          to the doctor, but again, that's not a -- a -- it -- it -- if  
23          it's -- if -- if -- if he is found to have been negligent  
24          previously, prior to 1995, then that may or may not have some  
25          bearing on -- on this motion.

1           And again, that would -- I -- I -- I -- I have -- I  
2 haven't asked you to present the file to me yet, but I'm  
3 probably going to.

4           Would there be -- I assume that -- that the file would  
5 contain discipline records, whether -- whether discipline --  
6 it -- if -- if at all.

7           Is that fair?

8           MR. SHEA: I don't --

9           THE COURT: Not to say he had discipline records, but a  
10 --

11          MR. HOGBERG: A personnel file --

12          THE COURT: But a discipline record would be held in the  
13 --

14          MR. HOGBERG: -- typically --

15          THE COURT: -- personnel file.

16          MR. HOGBERG: Yes.

17          THE COURT: Or his accommodation would be there. His  
18 curriculum vitae would be there. His training and experience  
19 that he might have had in another job is -- including his  
20 resume; is that fair?

21          MR. HOGBERG: Yeah. I would agree, yeah.

22          THE COURT: So if -- if -- if in fact he was in Baltimore  
23 for a two year stint and Baltimore should have been a one year  
24 stint, and if there was anything that Kessler -- Kessler  
25 suggested another dead doctor says to him that he had to --

1       that Zane had to repeat his Baltimore fellowship twice because  
2       he failed it the first time.

3             I don't know -- I -- that may or may not be in the  
4       record; is that fair?

5             MR. HOGBERG: I -- I don't --

6             THE COURT: I'm not asking you to tell me if it was in  
7       there.

8             MR. HOGBERG: Okay.

9             THE COURT: But that -- that would be something that  
10      could be possibly?

11            MR. HOGBERG: Could be in the personnel file. Sure.

12            THE COURT: So I'm very, very sensitive to that.

13            Now, I -- I know that --

14            You know, if I might, I took a little bit of issue with  
15      your statement that I said that --

16            You -- you said in your opening salvo that the Court,  
17      Muse J. presented a -- a status hearing and for some reason or  
18      other, I'll use the words --

19            Somehow or other I caught you off guard.

20            I don't think -- all I did was for status.

21            MS. SWEENEY: Page four. I see number ten where it says  
22      --

23            THE COURT: Yeah. There It is. The little --

24            MS. SWEENEY: What I was referring to --

25            THE COURT: The defendant's motion for new trial for

1 status and did not give the Commonwealth notice that the  
2 motion was marked up for hearing.

3 I don't understand what that means.

4 MS. SWEENEY: It said on the slip -- it says status,  
5 motion for new trial, and this motion was filed, you know, the  
6 discovery motion has a long history, so I wasn't able to give  
7 the OCME notice that there was going to be --

8 THE COURT: Oh.

9 MS. SWEENEY: -- a discovery issue involving their  
10 personnel file.

11 Had I known that, I would have had --

12 THE COURT: That's --

13 MS. SWEENEY: Attorney --

14 THE COURT: -- all you meant by it?

15 Okay.

16 MS. SWEENEY: Yeah. No, nothing offensive.

17 THE COURT: I don't have to say my bad?

18 MS. SWEENEY: I'm sorry?

19 THE COURT: I don't do a my bad to you?

20 MS. SWEENEY: My bad.

21 THE COURT: No, you don't have to --

22 I didn't do it, but -- okay. Fair enough.

23 Now, I -- the reason I -- I -- I indicated to everyone --  
24 you know, I've had this case directly assigned to me for --  
25 probably since 2012. I think that's about when Judge

1 Nickerson asked me to take it over because Judge Cannon had  
2 retired. So -- so I got the -- got this case.

3 I'm leaving here on the -- the -- the Hemingway book, For  
4 Whom The Bell Tolls, there's a bell out there ringing for me.

5 And I don't want to just dump the case on someone else.  
6 I've done an awful lot of work. I've been reviewing this  
7 thing intermittently since that time, and I'm not going to be  
8 able to hear the case because there's just no way in the world  
9 that the evidentiary hearings that are proposed, if -- if they  
10 are held, will be done between now and -- and -- and the  
11 beginning of next month, we're talking three or four weeks. I  
12 think that's pretty realistic.

13 And then I'll be off the Court when the hearing is over,  
14 and I don't think I have the authority to even write a  
15 decision to be frank with you.

16 So I'm kind of pushing things ahead to be able to give  
17 you some order and structure because this -- because this case  
18 has been pending for an awful long time, and I think I got a  
19 push from Attorney Shea about, you know, when are we going to  
20 have some kind of activity on this because you filed your  
21 motion in 2017, and there was no response from the  
22 Commonwealth until May 15th, I believe.

23 I think that's what you requested.

24 MS. SWEENEY: I -- I don't remember.

25 THE COURT: I think you did.



1 MS. SWEENEY: I think I --

2 THE COURT: You had good reason for it.

3 MS. SWEENEY: Okay.

4 THE COURT: You had good reason for it.

5 Your predecessor counsel retired and left you high and  
6 dry, and you needed time, and I think you told me there were  
7 about 25 different appeals, and I -- I granted it.

8 MS. SWEENEY: Uh-huh.

9 THE COURT: I granted it, and then I -- but it was -- and  
10 -- and I wanted to make certain that -- that it didn't come so  
11 perilously close that -- to my departure date that I could at  
12 least, first of all, have a hearing, some motions are taken on  
13 the papers, which is clearly -- is not being suggested I  
14 should, and I also want to be able to make an easy transition  
15 not just for -- for -- for the successor Judge, which I'm very  
16 interested in doing, but also for you folks as well.

17 So I want to -- I want to be able to manage this case as  
18 much as I can for the next several weeks, be able to make sure  
19 that you get a clear path, and so those are some of the things  
20 that I want to do today.

21 Now, let's -- let's hear you on the -- the Commonwealth  
22 is a -- I -- I --

23 Counsel, unless you want to argue further on the -- your  
24 objection, I think I clearly understand it.

25 MR. HOGBERG: I -- I just wanted to add that I know it's

1 a side note, but as far as the SJC matter with the public  
2 records request, there was a pending motion to dismiss that  
3 because additional documents were produced, a number of  
4 significant documents were produced.

5 I think over 3 --

6 THE COURT: Were they --

7 MR. HOGBERG: -- 300 pages --

8 THE COURT: -- from the --

9 MR. HOGBERG: I don't know.

10 THE COURT: -- personnel file?

11 MR. HOGBERG: I believe so, yes.

12 THE COURT: Well, regardless --

13 MR. HOGBERG: Right.

14 THE COURT: -- in other words, this is going to be a  
15 duplicative exercise; is that fair?

16 Not all -- not all of it has been produced; is that fair?

17 MR. HOGBERG: Right. There were certain obvious records  
18 that we discussed pursuant to Chapter 4, Section 7, so --

19 THE COURT: Okay. So -- so obviously we're not looking  
20 for duplication.

21 But let me see where the motion is, the actual motion  
22 that I was just looking at recently.

23 The motion for discovery is --

24 Okay. This is two paragraphs.

25 Here it is. Yeah. That's the one. So we're looking for

1 the personnel file and all documents evidencing and reflecting  
2 protocols or restrictions of OCME in existence in 1995 for the  
3 conduct of suspected homicide autopsies.

4 Any objection to that?

5 MR. HOGBERG: It's --

6 THE COURT: That's -- that's -- that's the -- basically  
7 the laboratory standard.

8 MR. HOGBERG: Could I -- don't have a copy of that in  
9 front of me.

10 THE COURT: Well, --

11 MR. HOGBERG: I --

12 THE COURT: -- it's actually -- I made reference to it.

13 It says a -- and it's -- what I made reference to, when I  
14 said, was there any standard -- Kessler makes reference to the  
15 fact that he should have gone to Boston and not -- not -- not  
16 Pocasset. And the -- the specific is, all documents  
17 evidencing or reflecting protocols or restrictions of OCME in  
18 existence in 1995 for the conduct of suspected homicide  
19 autopsies, whether imposed on Dr. Zane individually or more  
20 generally, including, but not limited to the use of OCME  
21 facilities in Boston for the conduct of such autopsies or the  
22 supervision of assistant medical examiners in the conduct of  
23 suspected homicide autopsies.

24 This does not seem to be within the embrace of the  
25 confidentiality issues that -- that I'm dealing with.

1           These are simply standards and protocols.

2           MR. HOGBERG: I would object because it does reference --  
3           may reference specifics. I'm not sure what the procedure of  
4           --

5           THE COURT: It's the standard and protocol.

6           I would assume -- I would assume that the standard -- it  
7           -- it -- it's not unlike any other protocol that would be  
8           followed.

9           Not to -- not to bring up Annie Dookhan's name again,  
10          but we've had about 6,000 cases being dismissed of drug in --  
11          drug testing improprieties because they violated the standards  
12          and the protocols.

13          MR. HOGBERG: Uh-huh.

14          THE COURT: And I'm not suggesting that this is the same  
15          case. But there's certainly no exemption of standards and  
16          protocols for the examination of -- for autopsies.

17          I mean the -- it would have been in place. I assume that  
18          that's -- that's fairly easy to discover. I'm sure I have --  
19          if I were to ask you for the 2018 ones, I'm sure you'd be able  
20          to hit a button in the computer and give it to me.

21          MR. HOGBERG: Definitely easier today.

22          THE COURT: Okay. So we -- and I'm sensitive to the  
23          burdens of it, but I see no reason why that can't be produced,  
24          to be very frank with you.

25          I don't see that coming under a public records exception,

1 and I think it's also something that's contemplated by the  
2 original request for -- what was the phrase that you used?

3 Laboratory --

4 MR. HOGBERG: Laboratory procedures.

5 THE COURT: Laboratory procedures.

6 So this is the -- this is -- this is -- this is  
7 resurrected as an issue because there's a claim made through  
8 Kessler, who represents personal knowledge of these matters,  
9 that says that 1995 such procedures existed.

10 Now, he -- he may very well be -- may have been  
11 completely on the mark of it, may have been untruthful, and I  
12 appreciate all of that.

13 But in this search for truth, we'll find out very easily.

14 Now, I assume the Commonwealth takes no position on that,  
15 it's -- am I right about that?

16 MS. SWEENEY: It's my understanding that would have been  
17 disclosed and was disclosed, the lab procedures back in --

18 THE COURT: I understand that but that's contradicted --

19 This is -- this is --

20 MS. SWEENEY: I'm --

21 THE COURT: Again --

22 MS. SWEENEY: -- objecting to the entire discovery  
23 motion, so yes, I would --

24 THE COURT: Okay.

25 MS. SWEENEY: -- object to that.

1 THE COURT: Well that's not going to help me.

2 MS. SWEENEY: Right.

3 THE COURT: What I need you to do is to be able to go in  
4 there and be able to find out the ones -- my -- my -- my -- my  
5 function is to say none of it should be disclosed because so  
6 much of it is confidential and none of it is relevant, and the  
7 test of relevance if -- is going to be based on what's being  
8 raised in the motion and with any supporting data that's been  
9 given.

10 What I can say is that the motion is -- is for a new  
11 trial. It's based upon the contradictory evidence of -- of  
12 the -- of -- of cause of death. That's the motion. The --  
13 the prima facia case has been established, representations  
14 made by a deceased medical examiner that has supervisory  
15 control over Dr. Zane at the relevant times, that professes  
16 knowledge of the facts, laboratory procedures, facts of -- of  
17 restrictions on his privileges, that may or may not be true.

18 But I -- I think that the -- the terms of the test for  
19 relevance and the Rule 17 considerations, I think he's made  
20 it.

21 I like to get into the balancing act, and there's nothing  
22 that -- that would stress the confidentiality considerations  
23 by producing protocols. So that's what I meant by, you know,  
24 if you have a basis that -- of -- of in -- I'd like to look at  
25 impact.

1           Now, let's talk about what's -- your position is a  
2       general objection, and I want to hear you on that.

3           MS. SWEENEY: So it -- it is a general objection under  
4       Rule 30(c)(4), that the defendant hasn't met his burden to  
5       show a prima facia case that would entitle him to post  
6       conviction discovery.

7           The motion is phrased as -- you know, starts off with  
8       personnel file and then there's certain items that he listed  
9       that we just went over.

10          And that phrase personnel file is very broad and very  
11       vague --

12          THE COURT: Not really.

13          MS. SWEENEY: And --

14          THE COURT: Let -- let me tell you why it's not? Ready?  
15       Watch this.

16          Counsel, he had the personnel file; correct?

17          MR. HOGBERG: Yes.

18          THE COURT: And that personnel file is maintained in the  
19       regular course of business for all employees?

20          MR. HOGBERG: Yes.

21          THE COURT: That's not vague.

22          Now, it --

23          MS. SWEENEY: Well as far as years, it's not narrowly  
24       tailored --

25          THE COURT: Right.

1 MS. SWEENEY: -- as far as --

2 THE COURT: Whoa, whoa, whoa.

3 MS. SWEENEY: -- his --

4 THE COURT: Hold it.

5 It's relevant to -- to -- to -- it may not be tailored  
6 enough in terms of the confidentiality issues, but the  
7 personnel file is -- is an easily identifiable document  
8 because all employees at -- everywhere in personnel files, and  
9 in it will become a repository of certain information, some of  
10 which is protected from public record disclosure.

11 So we're going to talk about the personnel file, but did  
12 you bring it with you by any chance?

13 MR. HOGBERG: I do not have it with me, no.

14 THE COURT: Okay.

15 So --

16 MS. SWEENEY: It's a -- it's general -- in the  
17 Commonwealth's position, a fishing expedition --

18 THE COURT: No, no --

19 MS. SWEENEY: -- because --

20 THE COURT: -- not because it's a fishing ex --

21 MS. SWEENEY: It's --

22 THE COURT: -- but it --

23 MS. SWEENEY: -- based on --

24 THE COURT: -- but -- but you agree with me that there is  
25 a personnel file that was maintained for --



1 MS. SWEENEY: I don't work for the OCME. They're --  
2 according to the defense -- or the attorney, there is, but I  
3 have no -- you know --

4 THE COURT: So --

5 MS. SWEENEY: -- it's not under my wheelhouse. I can  
6 accept --

7 MR. HOGBERG: And, Your Honor, --

8 MS. SWEENEY: -- his representation --

9 MR. HOGBERG: -- at the --

10 MS. SWEENEY: -- but I wouldn't personally --

11 THE COURT: Well, you can't, so you're not going to --

12 MR. HOGBERG: Well --

13 THE COURT: -- object to it.

14 I mean you're not going to -- there's nothing to  
15 contradict the fact that there is an identifiable --

16 You raised an issue as being too vague.

17 MS. SWEENEY: Yes.

18 THE COURT: And I said to you I -- I'm going to find out  
19 whether it's vague or not, and -- and --

20 MS. SWEENEY: Okay.

21 THE COURT: -- it -- there is a personnel file that was  
22 maintained.

23 MR. HOGBERG: I --

24 MS. SWEENEY: Okay.

25 MR. HOGBERG: Your Honor, on that note, that -- I -- I

1 was not there at -- in 1995 or prior to that. But at -- so I  
2 can't speak to the specifics of maintaining any personnel file  
3 then as compared with now, but yes, certainly, there are  
4 documents that have been produced from a personnel file.

5 So --

6 THE COURT: There is --

7 MR. HOGBERG: -- yes.

8 THE COURT: -- personnel --

9 MR. HOGBERG: Yes.

10 THE COURT: -- file that is local -- that -- that can be  
11 located for him. He's no longer with you; right?

12 MR. HOGBERG: He's not a -- an employed doctor --

13 THE COURT: Right.

14 MR. HOGBERG: -- for the OCME as a full time.

15 THE COURT: So he's working on contract with you?

16 MR. HOGBERG: I believe so, Your Honor.

17 THE COURT: Okay. So period, we now have a personnel  
18 file.

19 That -- that's -- that not so broad and so uncertain.

20 Now, other objections that you have?

21 MS. SWEENEY: It -- it's really a -- a fishing expedition  
22 based on newspaper articles and an unsigned letter from the --

23 THE COURT: Okay.

24 MS. SWEENEY: -- deceased supervisor who's filed  
25 multiple, you know, in the McGowan case for example on Dr.

1 Neves, I think is the --

2 MR. HOGBERG: Neels.

3 MS. SWEENEY: Neels.

4 It -- it's statements from a disgruntled employee based  
5 on allegations that it -- you know, from 1995 that he's now  
6 trying to resurrect and coupled with these newspaper articles,  
7 and that doesn't show a prime facia case for relief to go and  
8 --

9 THE COURT: Well --

10 MS. SWEENEY: -- pick through --

11 THE COURT: -- you -- the -- do you want me to talk about  
12 the fact that there may have been --

13 Now, I was aware that there may have been an -- there was  
14 animosity and -- and -- and ill will between the two people.  
15 That doesn't mean that what he says is untrue. What it means  
16 is that it's -- it should be accepted with caution. It  
17 doesn't exclude it. It means it should be accepted with some  
18 caution; is that fair?

19 MS. SWEENEY: Are you talking about the letter --

20 THE COURT: Considered --

21 MS. SWEENEY: -- should be accepted --

22 THE COURT: Certainly.

23 MS. SWEENEY: I -- it's -- has different circumstances of  
24 how it came to light. So as far as -- I -- I see your point.  
25 I'm not going to --

1 THE COURT: Okay.

2 MS. SWEENEY: -- concede --

3 THE COURT: I don't --

4 MS. SWEENEY: -- necessarily.

5 THE COURT: I'm not asking you to concede anything.

6 MS. SWEENEY: I know I'm not conceding anything.

7 THE COURT: I get the -- I get to --

8 MS. SWEENEY: But --

9 THE COURT: -- I get to make decisions regardless of  
10 whether you agree with them or not.

11 MS. SWEENEY: Right.

12 THE COURT: It's okay. I'm not -- and I'm not -- and I'm  
13 here not to appease you and I'm not here to be able to please  
14 you.

15 I'm going to -- just here to try to figure out what the  
16 concerns are so I can address them fairly for everybody. No  
17 one wants to be going through a -- a -- through a new trial on  
18 a matter effecting a jury's previous consideration except with  
19 good cause, and we're at the threshold of finding out whether  
20 there is good cause right now.

21 MS. SWEENEY: Right.

22 THE COURT: So I -- I don't find this to be very  
23 problematic in many ways.

24 Dr. Kessler's letter, to repeat, is something that I will  
25 accept as being one that was from him, to counsel, that is

1       that it's authentic.

2               Secondly, as to whether or not it's admissible, that's a  
3       big stretch to say that at this point. This is not here to be  
4       cross-examined and he's making a lot of claims.

5               But from a person that says regardless of not being under  
6       oath, and I appreciate the distinction, regardless of not  
7       being under oath, and regardless of the fact that -- that this  
8       may lead to -- be another moment to spew hatred towards a  
9       person you dislike from the grave of all times, I appreciate  
10      that as well.

11              It's a -- I'm trying to consider these things fairly.

12              But there is information in there that is easily  
13      contradicted or supported by a review of the file. So I -- I  
14      don't -- I -- I appreciate -- I appreciate the fact that there  
15      may have been bad blood.

16              I appreciate the fact that there may have been  
17      misrepresentations.

18              I appreciate the fact that there may have been  
19      misrepresentations based upon the bad blood, but that doesn't  
20      mean that it doesn't exist.

21              So I think we have to sort out the substantive part of it  
22      right now.

23              MS. SWEENEY: Okay.

24              THE COURT: What I would propose is that the -- that the  
25      OCME get together with the DA who would like to participate in

1       it, review the file, and tag things very clearly.

2           MS. SWEENEY:   The personnel file?

3           THE COURT:    Yeah.

4           MS. SWEENEY:   I -- I don't feel as though it's  
5       appropriate to have me review the personnel file.

6           THE COURT:    I said if you chose to.

7           MS. SWEENEY:   Okay.

8           THE COURT:    I said if you chose to, and I'll explain to  
9       you why.

10          And this is -- you just raised a reason why you don't  
11       want to do it.

12          So I'll ask OCME to be able to raise any issues.

13          Now, for instance, there are many things that make --  
14       that may be included in it.  It could have been a complaint  
15       from an ex-wife that says that he was all sorts of abusive,  
16       etcetera, etcetera, etcetera.  I'm not suggesting that he was,  
17       but that would probably be a document you'd want to red flag  
18       because it has not probative value, and it would also probably  
19       be very humiliating in the untested and -- would be unfair for  
20       his disclosure.

21          So those are some of the things that I'm trying to do to  
22       make sure that there's no unfair disclosure for the -- of the  
23       -- any of the -- anything that may relate to Dr. Zane.

24          How he performed in other matters may or may not be  
25       relevant.  That may be time sensitive for instance.

1           The fact that he may have been terrible in 2005 in terms  
2 of the conduct of autopsies doesn't mean that he wasn't  
3 comporting with the required standards in -- in 1995. And I  
4 think that's one of the re -- one of the -- one of the issues  
5 that you've raised.

6           I think it's quite correct that -- that just because he  
7 does something subsequent doesn't mean that he was infern at  
8 the relevant time.

9           I want it done quickly, please. I want you to red flag  
10 it. I'll do an in camera inspection. I'll consider all of  
11 the issues. I will -- I will be looking for things that will  
12 be related to the arguments that have been made by counsel,  
13 but essentially some of the matters, there's only several  
14 actually, several matters that were raised by Kessler.

15           And I will further require, you know, following the other  
16 protocols, I'll -- I will allow if -- if -- if I allow any of  
17 it to go forward, I will allow only counsel, counsel only, to  
18 inspect the records.

19           And then that will be done at the courthouse, so you  
20 don't have to make another trip down here.

21           I don't you live -- you work across the hall so it's --  
22 the street, so that's easy and I will consider any arguments  
23 of -- of production and further disclosure.

24           At some point, the defendant will of course have the  
25 opportunity -- if anything is produced, he of course will have

1 the opportunity to -- to inspect and to consider and to  
2 discuss things with his counsel if they're produced but that's  
3 not going to happen before we go to this next step.

4 So I will ask you to produce it. I will ask -- I will  
5 ask you particularly to red flag any of the documents. You  
6 can do it by a summary fashion and stickers, you know, so I'll  
7 be a little targeted. Tell me -- tell me where it is. I -- I  
8 can make sense of it.

9 And then if any of the documents are to be produced for  
10 inspection, I will give both parties the opportunity to  
11 inspect them in the clerk's office.

12 And then I will ask you to be able to decide what  
13 documents you would be seeking for pro -- production, both of  
14 you, and objections to it, and -- and I will consider that as  
15 well.

16 I want this whole thing to be done within two weeks, so  
17 I'm hoping you're not going away on a long vacation; are you?

18 MR. SHEA: Yes, I am.

19 THE COURT: Well, this is going to be a problem because  
20 I'm going away on a permanent vacation, so I've got to get it  
21 done. When are you -- when are -- what -- what's your -- what  
22 are your -- what are your scheduling difficulties of making  
23 that exception?

24 MR. SHEA: This -- I was not planning on coming back till  
25 August 7th.



1 THE COURT: Where are you going?

2 MR. SHEA: Europe.

3 THE COURT: When are you leaving?

4 MR. SHEA: Next Monday night.

5 THE COURT: Well, I'm going to have to -- I'm going to  
6 ask you to produce that beforehand. This is going to be a --  
7 you're going to be -- you're going to get your Christmas bonus  
8 from this.

9 I need you to produce it for me. I want you to red flag  
10 everything. I want it down here, and I want him to be able to  
11 see it.

12 Monday night is -- this coming Monday?

13 MR. SHEA: Yes.

14 THE COURT: You have a flight?

15 MR. SEHA: Yes.

16 THE COURT: What time?

17 MR. SHEA: 7 p.m.

18 THE COURT: Well --

19 Can you get it -- can you get that record down here by  
20 Friday?

21 BY MR. HOGBERG: I -- I mean I can try -- you know, I --

22 THE COURT: It's going to come to me and no one else.

23 MR. HOGBERG: You know, just to clarify, you did mention  
24 production. It was production to the Court for the --

25 THE COURT: Production --

1 MR. HOGBERG: -- review.

2 THE COURT: -- just to me.

3 I'm going to examine it, and it's going to require me to  
4 push it forward.

5 Do you have an associate with you?

6 MR. SHEA: No.

7 I can change my plane ticket.

8 THE COURT: No, I don't want you to do that. I'm trying  
9 to work that through.

10 It's -- I wouldn't ask -- I wouldn't -- I wouldn't ask  
11 myself to be ordered to do that as well. But I don't want to  
12 hasten it to a point where --

13 MS. SWEENEY: Would you mind if we could -- you know,  
14 recuse for five minutes so I could speak with counsel and I  
15 could talk with my office about this and then come back? Just  
16 for five minutes?

17 It --

18 THE COURT: Surely.

19 I -- is --

20 MS. SWEENEY: Five minutes is all I need. I just have to  
21 make a quick phone call.

22 THE COURT: To do what now? In the sense of -- I mean  
23 you want to speak to -- privately, but -- but I mean --

24 MS. SWEENEY: Yes.

25 THE COURT: Is it going to address the issue of --

1 MS. SWEENEY: Exact issue what you're just --

2 I think I can solve us a lot of problems --

3 THE COURT: Go ahead.

4 MS. SWEENEY: -- if I --

5 THE COURT: Five minutes.

6 MS. SWEENEY: Thank you.

7 THE COURT: Take a bathroom break as well.

8 We'll have a five minute recess.

9 COURT OFFICER: Court, all rise.

10 (Recess taken.)

11 (Discussion off the record.)

12 THE COURT: So you have my curiosity.

13 MS. SWEENEY: Yes.

14 I'm filing a 211, 3 and orally moving to stay the motion  
15 for new trial proceedings while I pursue an appeal to the  
16 Single Justice.

17 THE COURT: Oh, good for you.

18 MS. SWEENEY: Yeah.

19 THE COURT: Just file it. I'm not going to allow it, but  
20 I will so order you to produce the -- the records --

21 MS. SWEENEY: And I'm going to move for an emergency stay

22 --

23 THE COURT: You can do that.

24 MS. SWEENEY: -- pending appeal.

25 THE COURT: That's fine.

1           Is that why we went out there?

2           That doesn't help us.

3           I -- you invite a lot -- a lot of issues as to whether or  
4 not this should have been disclosed in the first instance, and  
5 I -- I -- I think that trying to move this thing along quickly  
6 is going to be the most important matter.

7           I'm going to ask that a transcript of this proceeding be  
8 immediately typed up. I want counsel to be assured that this  
9 transcript of this hearing and all of the matters that have  
10 been raised are -- are produced.

11          Taking a 211, 3 before I even issue an order is -- is  
12 rather disingenuous. I thought we were trying to do something  
13 to figure out a way for counsel to go on a vacation and for me  
14 to be able to address some of these issues.

15          So let me make it very clear. I'll make the final  
16 rulings, and you can take your appeal and I -- I -- I hope  
17 that it's done with alacrity, because I've been very, very  
18 generous with the Commonwealth in terms of the time delays.

19          I was appreciative of your schedule, and that's why we  
20 didn't have a hearing until May.

21          I had repeated requests to -- to expedite this. I  
22 indicated to you that I shall be retiring on August, the 16th,  
23 and I have taken my time away from -- from vacation as well to  
24 be able to be here to make sure that this process is done  
25 efficiently and economically.

1           This case was given to me in 2012 or '13 by Judge  
2 Nickerson. I've been monitoring it. I've seen different  
3 parts of it. I know an awful lot about the case, and I wanted  
4 to make an easy tran -- transfer of it.

5           But with regard to the motion for discovery, let me be  
6 very clear. I've considered all of the arguments of counsel  
7 and appreciate the fact that the personnel records have a --  
8 have a level of protection.

9           The defendant has been able to raise substantial issues  
10 of relevance, the Kessler letter is sufficiently reliable, and  
11 is accepted by the Court as being authentic. Whether it is  
12 admissible is not the finding.

13           Substantial claims of incompetence of an expert have been  
14 raised.

15           More than just by published reports, but also by actual  
16 cases that have been identified by the defense.

17           There have been substantial issues raised by the defense  
18 as to whether Dr. Zane performed the autopsy in a manner that  
19 was compliant with the standards and regulations then  
20 governing the -- the OCME.

21           Further, there is a substantial issue of whether he had  
22 the right to be able to conduct an unsupervised homicide  
23 autopsy.

24           There is a substantial issue raised as to whether he  
25 comported with the standards required by OCME with regard to

1 the location of where that autopsy would be conducted, whether  
2 it would be at the so-called state of the art facility in  
3 Boston, or the -- the lesser facility in Pocasset.

4 There are substantial claims for relief raised by  
5 prominent pathologists who have effectively declaimed that the  
6 opinion of Dr. Zane was not founded on good science, was not  
7 founded on good procedures, was not founded on following  
8 acceptable standards, and that the opinion of cause of death  
9 through suffocation and no other causes on the face of the  
10 evidence right now is severely challenged.

11 That fact, since notwithstanding some other  
12 circumstantial evidence that would be very relevant for the  
13 prosecution of the case, that fact of cause of death was the  
14 most substantial issue presented to the jury, whether the  
15 defense counsel at the time was derelict in their examination  
16 of Dr. Zane, whether they were derelict in not getting other  
17 experts, whether the Commonwealth was complicit in the failure  
18 to produce any documents is an open question that will be  
19 resolved in the future.

20 Now, regardless of the outcome of this case, the -- I am  
21 going to order an evidentiary hearing on this motion. I'm  
22 going to order a time to be sometime in mid-September.

23 I'm going to direct my RAJ of -- of the outcome of this  
24 case today, and I'm going to suggest that he transfer the case  
25 either to Dr. -- Judge Ruffo for further assignment or whether

1 he accepts it himself or otherwise.

2 So take out your books, counsel, and tell me which day in  
3 September will be appropriate to consider the hearing on this  
4 motion for status purposes only, for -- for -- for the further  
5 pretrial conference with the Judge for the conduct at the  
6 evidentiary hearing which I am ordering.

7 Take it out.

8 Counsel?

9 MR. SHEA: I don't need to.

10 I'm -- I'm open throughout September.

11 THE COURT: Okay.

12 And Amanda, what's a good date for -- for this kind of  
13 hearing in the afternoon that would be less intrusive on other  
14 things?

15 THE CLERK: Monday, Wednesday or Friday.

16 THE COURT: So we'll take a Wednesday. That's --

17 THE CLERK: Okay.

18 THE COURT: -- an easy one.

19 Why don't we do it sometime maybe the 2nd or 3rd week  
20 following Labor Day which is probably around the --

21 THE CLERK: 3rd --

22 THE COURT: -- 18th?

23 THE CLERK: Yeah. So the --

24 THE COURT: I that a Wednesday?

25 THE CLERK: 19th is a Wednesday.

1 THE COURT: 19th everyone?

2 MR. SHEA: That's fine.

3 THE COURT: Good?

4 Yes?

5 MR. HOGBERG: Yes.

6 THE COURT: Okay. And that will probably have the Single  
7 Justice issue resolved by then.

8 MR. SHEA: Before the -- the 211, 3 motion appeared, I  
9 was going to suggest that if you needed to expedite the  
10 review, that Counsel for OCME could probably scan all of these  
11 documents.

12 THE COURT: No, we don't do it that way.

13 What's going to happen is once it's been produced -- I'm  
14 ordering that they be produced within the Court by next  
15 Wednesday with any objections that you have, and of course  
16 that may very well -- that may very well be superseded by a  
17 Single Justice order.

18 MS. SWEENEY: I probably will be filing an emergency stay  
19 with the Single Justice --

20 THE COURT: I would --

21 MS. SWEENEY: -- just to --

22 THE COURT: -- assume --

23 MS. SWEENEY: -- keep you --

24 THE COURT: -- you would be.

25 MS. SWEENEY: -- in the loop.



1 THE COURT: All right.

2 MS. SWEENEY: I -- I'm trying to be candid and keep  
3 everybody in the --

4 THE COURT: Well, 211, 3 suggests that. I'm not going to  
5 hear or allow the stay.

6 The Court may very well contact me to see whether or not  
7 I'm willing to grant a stay, but I think I put my -- my  
8 position clearly on the record that I -- I -- I am a -- under  
9 the constraints of time that -- that I'm addressing for the  
10 benefit of everyone.

11 So when you make sure that the copy of the nisi order  
12 that was given in the past since we resumed.

13 THE CLERK: Uh-huh.

14 THE COURT: Is given.

15 And my -- my request is that it -- very expedited  
16 transcript of this proceeding today be presented, and -- and  
17 at the cost of the Court, transmitted to both counsel, but  
18 please feel free to have yourself or -- or anyone else use it  
19 at the Single Justice hearing and request -- request an  
20 opportunity to be heard, I assume.

21 All right, everybody.

22 MR. HOGBERG: Your Honor, just --

23 THE COURT: Oh -

24 MR. HOGBERG: -- to clarify.

25 You said next Wednesday --

1 THE COURT: Unless it's superseded by the order.

2 MR. HOGBERG: Okay. Thank you, Your Honor.

3 THE COURT: I'm sur the Commonwealth will say that the  
4 stay has been granted or not granted.

5 MS. SWEENEY: Yes.

6 THE COURT: And you can have a very nice vacation and not  
7 worry about this.

8 When you get back on the 7th, if we have it produced, I'm  
9 going to have you examine it promptly.

10 MR. HOGBERG: I will.

11 THE COURT: All right, everybody.

12 Thank you all.

13 COURT OFFICER: All rise.

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(Adjourned)



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Donna Holmes Dominguez, ACT, CET  
Notary Public, Commission Expires 5-17-24

July 16, 2018 \_\_\_\_\_  
Date

(781) 575-8000 \_\_\_\_\_

[donna@dhreporting.com](mailto:donna@dhreporting.com)

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